FOR ARGUMENT

Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Appellant,

—v.—

CORA MCRAE, ET AL.,
Appellees.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Appellant,

—v.—

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

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—v.—

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLEES

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of New York of January 15, 1980 is not yet reported. See Motion of Defendant-Appellant to Dispense with Printing of the District Court's Opinion and the Accompanying Annex.

JURISDICTION

This is a civil proceeding to which the United States is a party and in which a series of Acts of Congress have been held unconstitutional: Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976); Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977); Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978); Pub. L. No. 96-123, § 109, 93 Stat. 126 (1979). The final judgment of the District Court was entered on January 15, 1980. The jurisdiction of this Court rests on 28 U.S.C. § 1252. Notice of Appeal to this Court was filed in the United States District Court for the Eastern District of New York on January 15, 1980 by the Defendant-Appellant, the Secretary of the Department of Health, Education and Welfare, and by the intervening Defendants-Appellants James L. Buckley, Jesse Helms, Henry T. Hyde, and Isabelle M. Pernicone on January 26, 1980. On February 5, 1980, Plaintiffs-Appellees moved this Court to hear arguments in tandem with *Williams v. Zbaraz*, 79-4, 79-5, 79-491. On February 11, 1980, Defendants-Appellants moved this Court for a stay of the District Court judgment pending appeal. On February 19, 1980, this Court denied Appellants' Motion, granted jurisdiction (79-1268), and ordered that this case be heard in tandem with *Williams v. Zbaraz,* 79-4, *Miller v. Zbaraz,* 79-5, and *United States v. Zbaraz,* 79-491. (A.332)

QUESTIONS PRESENTED

1. Does the Hyde Amendment violate the Due Process Clause of the Fifth Amendment?

a. Does the Hyde Amendment violate equal protection guarantees by excluding virtually all medically necessary abortions from a program that reimburses for all other medically necessarv services?

b. Does the Hyde Amendment interfere with and penalize the liberty to protect one's health in the abortion context?

c. Is the Hyde Amendment void for vagueness?

2. Does the Hyde Amendment violate the Free Exercise Clause of the First Amendment as well as the Due Process Clause of the Fifth Amendment by infringing on the right of poor women to make conscientious decisions with their physicians, that abortions are necessary to their health?

3. Does the Hyde Amendment violate the Establishment Clause of the First Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Establishment and Free Exercise Clauses of the First Amendment to the Constitution of the United States:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The Due Process Clause of the Fifth Amendment to the Constitution of the United States:

> No person . . . shall be deprived of life, liberty or property without due process of law.

2. The Social Security Act, 42 U.S.C. § 1396 (1976); 1396a(a) (1976); 1396b(a) (1976), *as amended by* Pub. L. No. 95-142, §§ 10(a), 17(a), 91 Stat. 1175 (1977); 1396b(p) (1976) *as amended by* Pub. L. No. 95-142, § 11(a), 91 Stat. 1175 (1977); 1396(d)a (1976), *as amended by* Pub. L. No. 95-210, § 2(a), 91 Stat. 1485 (1977); 1396f.

3. The Hyde Amendments: Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976); Pub. L. No. 95-205, § 101, 91 Stat. 1460 (1977); Pub. L. No. 95-480, § 210, 92 Stat. 1586 (1978); Pub. L. No. 96-123, § 109, 93 Stat. 126 (1979).

STATEMENT OF THE CASE

A. History of the Legislation

Harris v. McRae is a challenge to riders to the Labor-HEW Appropriations Act, generally known as "Hyde Amendments," which have been enacted annually since 1976. For four years the question of federal funding of abortions for poor women under Medicaid and other programs has been the subject of much Congressional debate. Each year the question of federal abortion funding has held hostage the annual HEW-Labor budgets.

The rider passed in 1976 to the Fiscal Year 1977 Act[1] was enacted over the President's veto on the last day of fiscal year 1976. The Conference Report, reached after four grueling sessions and finally adopted by both houses, provided that:

> None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term. It is the intent of the conferees to limit the financing of abortion under the Medicaid program to instances where the performance of an abortion is deemed by a physician to be of medical necessity and to prohibit payment for abortions performed as a method of family planning or for emotional or social convenience. It is not our intent to preclude payments for abortions when the

[1] The riders will be referred to herein as FY 77-FY 80, reflecting not the year of their enactment but the budgetary year to which they apply, *e.g.*, the 1976 enactment will be referred to as the 1977 Hyde Amendment.

life of the woman is clearly endangered, as in the case of multiple sclerosis and renal disease, if the pregnancy were carried to term; nor is it the intent of conferees to prohibit medical procedures necessary for the termination of an ectopic pregnancy or the treatment of rape or incest victims; nor is it intended to prohibit the use of drugs or devices to prevent implantation of the fertilized ovum. Pub. L. No. 94-439, § 209, 90 Stat. 1434 (1976).

The 1978 Hyde Amendment passed December 7, 1977 after almost six months of debate.[2] The compromise finally enacted contained three exceptions:

> None of the funds provided for in this paragraph shall be used to perform abortions except where the *life of the mother would be endangered* if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, where such *rape* or *incest* has been reported promptly to a law enforcement agency or public health service; or except in those instances where *severe and long-lasting physical health damage to the mother* would result if the pregnancy were carried to term when so determined by two physicians. Nor are payments prohibited for drugs or devices to prevent implantation of the fertilized ovum, or for medical procedures necessary for the

[2] Following the initial House and Senate floor votes, the 1978 rider was the subject of seven conference committee sessions, nine House floor debates, ten Senate floor debates, and 27 floor votes. *See McRae v. Harris*, No. 76-C-1804 (E.D.N.Y., Jan. 15, 1980) Slip op. at 26 (hereinafter "Slip op."). A copy of legislative history is being lodged for the convenience of the Court.

> termination of an ectopic pregnancy. The Secretary shall promptly issue regulations and establish procedures to insure that the provisions of this section are rigorously enforced. (Emphasis added.) Pub. L. 95-205, § 101, 91 Stat. 1460 (1977).

The 1979 Rider, Act of Oct. 18, 1978, Pub. L. No. 95-480, § 210, 92 Stat. 1586, was identical.

The current Hyde Amendment, passed November 20, 1979 eliminated the severe and long-lasting health damage exception. Pub. L. No. 96-123, § 109, 93 Stat. 926.

The trial court found that the purpose of the Amendments was, simply, to prevent abortions. Slip op. at 165. The Amendments' proponents sought to nullify *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973), to the extent legislatively possible because they viewed abortion as the "taking of human life, and, therefore, not debatable." [3] Slip op. at 164. Appropriations riders were used because "efforts to bring the abortion issue to debate on a proposed constitutional amendment had failed." [4] Slip Op. at 21.

Moreover, the court found that the restrictions of the Amendments reflect a compromise "negotiated across an unbridgeable gulf of principle" (slip op. at 165), exacted only because of the tremendous pressure

[3] The trial court made extensive findings of fact on the legislative history and purpose of the Hyde Amendment. Slip op. at 16-43.

[4] Hearings on proposed "Human Life Amendments" were held by the Judiciary Committee of both Houses in 1975. Both Committees refused to approve an amendment for consideration by their respective bodies.

created by the need for the annual budgets. Slip op. at 278. "[T]he amendments are enactments of the House of Representatives to which the Senate has acceded, with such amendments as it could negotiate, rather than risk the appropriations bills." Slip op. at 279.

As such, the meager exemptions extracted each year disregard both the medical realities of pregnancy and professional standards of medical care.

In addition to the health issues, pro-choice legislators repeatedly asserted the constitutional and conscientious nature of the abortion right and the intolerability of imposing upon poor women the religious, moral view that condemns abortion. Their "every argument was met with the assertion that the fetus was inviolable human life, that there was nothing to discuss." Slip op. at 274.

B. History of the Litigation

Harris v. McRae is a class action filed October 1, 1976 seeking declaratory and injunctive relief against the Secretary of the Department of Health, Education and Welfare (hereinafter "HEW") to prevent implementation of the 1977 Hyde Amendment. Plaintiffs have amended the complaint to challenge the 1978, 1979, and 1980 "Hyde Amendments." [5] (A.58-80; A.90; A.95.)

[5] The following designations are used to refer to the documents filed with this Court in this litigation: "A."—Appendix; "R."—Record item (numbered according to the list of items transmitted to this Court by the district court on March 21, 1980; "Pl. Exh./T." refers to the transcript page at which the document was admitted in evidence. No transcript reference is available for Plaintiffs' Exhibits 8a, 200-290, which were put into evidence on August 2 and 3, 1978, or for Plaintiffs' Exhibits 300-471, which were admitted by Court Order on February 14, 1980. (A.96-97.) Plaintiffs have lodged for the convenience of the Court state laws and policies enacted pursuant to the Hyde Amendments (Vol. I), critical medical articles placed in evidence (Vol. II), legislative history (Vol. III), and key religious documents (Vol. IV).

Plaintiffs-appellees include:

(1) CORA McRAE, from New York, and four anonymous Medicaid-eligible women from Connecticut and Minnesota who were denied Medicaid reimbursement for abortions even though their doctors concluded that their abortions were medically necessary because of physical and mental health indications. They represent a certified nationwide class of indigent pregnant women seeking abortions which their doctors consider medically necessary.[6]

(2) DRS. IRWIN B. TERAN, JANE HODGSON, DAVID B. BINGHAM, HUGH SAVAGE, EDGAR W. JACKSON, and LEWIS H. KOPLIK, physicians from New York, Connecticut, Texas, New Mexico and Georgia, who would be willing to perform medically necessary abortions for indigent pregnant women but for the absence or threatened absence of Medicaid reimbursement because of the Hyde Amendment. They represent a nationwide class of such providers.

(3) The WOMEN'S DIVISION OF THE BOARD OF GLOBAL MINISTRIES OF THE UNITED METHODIST CHURCH and two officers, on behalf of themselves and their membership, among whom are

[6] The October 22, 1976 decision certified plaintiffs' classes of indigent eligible women and abortion providers and permitted intervention as defendants by Isabelle E. Pernicone as *guardian ad litem* and by Senators Buckley and Helms and Congressman Hyde as taxpayers. *See McRae v. Mathews*, 421 F. Supp. 533 (E.D.N.Y. 1976). The classes were recertified on January 29, 1979, and in the final judgment of the Court. (A.92-94; A.86-87.)

indigent pregnant women who are dependent on Medicaid to obtain safe abortions which are medically necessary and who object to the imposition on them of religious beliefs about abortion which they do not share, thereby preventing exercise of their freedom of conscience.

(4) PLANNED PARENTHOOD OF NEW YORK CITY (PPNYC), a not-for-profit New York corporation providing family planning services and first trimester abortions at state licensed clinics. The Hyde Amendments have placed their receipt of state and local funds for medically necessary abortions in jeopardy.

(5) The NEW YORK CITY HEALTH AND HOSPITALS CORPORATION (NYCHHC), is a public benefit corporation charged with the responsibility for providing comprehensive health and medical services to the residents of New York City. The NYCHHC operates 18 municipal hospitals, 12 of which perform abortions. As the largest single provider of medically necessary abortions to indigent pregnant women in New York City, the NYCHHC appears to defend its fiscal interest in reimbursement for these abortions to preserve its overall economic capacity to render adequate medical care to all its patients.[7]

The district court issued a preliminary injunction preventing implementation of the original Hyde Amendment. *McRae v. Mathews*, 421 F. Supp. 533 (E.D.N.Y. 1976). On June 29, 1977, this Court vacated that judgment and remanded the case to the district

[7] *New York City Health and Hospitals Corporation v. Mathews*, No. 76-C-1805, was simultaneously filed and proceeded as a companion case to *McRae*. The two cases have been informally consolidated for this Court's review.

court for reconsideration in light of *Beal v. Doe*, 432 U.S. 438 (1977), and *Maher v. Roe*, 432 U.S. 464 (1977). (R.56.)

On August 4, 1977, the district court vacated its order and HEW immediately implemented the 1977 Hyde Amendment. Evidentiary hearings began on August 3, 1977, and continued intermittently for over a year.

On January 15, 1980, the district court held the Hyde Amendment unconstitutional under the Fifth and First Amendments and ordered HEW to fund all medically necessary abortions. (R.219, A.86.) A stay of the injunction was ordered for 30 days.[8] (R.220.) On February 19, 1980, this Court noted probable jurisdiction, denied defendant's and defendants-intervenors' motion for a stay, and granted plaintiffs' motion to hear argument in tandem with *Williams v. Zbaraz*, No. 79-4; *Miller v. Zbaraz*, No. 79-5; *United States v. Zbaraz*, No. 79-491. *Harris v. McRae*, No. 79-1268. (A.332) Accordingly, on that date, defendant HEW sent a notice to all Regional Commissioners to inform states, medical providers, and recipients of the distict court's order and of the states' obligation to fund medically necessary abortions in their Medicaid programs.

[8] Judgments and orders of the district court of January 15, 1980 were appended to the Government's Application for a Stay of the Judgment of the District Court Pending Appeal.

C. Facts

1. Introduction

On remand, the district court made extensive findings of fact, based largely on undisputed evidence. Plaintiffs presented over 30 witnesses, including acknowledged medical experts and theologians. A description of these witnesses is included in the appendix at the end of plaintiffs' brief. Nearly 500 exhibits, including official HEW documents and unpublished studies and data, were introduced into evidence.

Plaintiffs introduced evidence on the meaninglessness of the "life-endangering and severe and long-lasting physical health damage" standards of the Hyde Amendments in the context of the medical realities of pregnancy. Plaintiffs' proof further addressed the religious nature of the abortion decision, the irreconcilable religious differences over abortion, and the religiosity of the Hyde Amendments. Defendant HEW offered no medical or religious witnesses. Defendants-intervenors presented both medical and religious testimony, which the trial court found not inconsistent with plaintiffs' evidence. Slip op. at 99-100.

The findings of fact include the probable impact of the Hyde restrictions, as well as their actual impact where they have been implemented. The findings conclude that the Hyde Amendments were designed to prevent abortions, not to encourage normal childbirth or to fulfill any medical need, and that most women who need abortions to avert unacceptable health risks are not covered by the Amendments. Slip op. at 318, 322-23. Moreover, the trial court found the standards so vague and unworkable that even those women whose lives are in fact endangered are not receiving needed Medicaid abortions. Slip op. at 91, 110, 322-23.

2. Implementation of the Hyde Amendment Resulted in States Adopting the Hyde Standard or a Similar Standard for Medicaid Abortions.

When the Hyde Amendment first went into effect on August 4, 1977, virtually every state was funding all, or all medically necessary, abortions.[9]

The Court below found that ". . . the Hyde Amendment has precipitated changes in state law and Title XIX plans that depend for their validity on the validity of the challenged Amendments." Slip op. at 283.

Most states reacted in 1977 by restricting their own funding to the Hyde standard.[10]

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[9] As of July 24, 1977, an informal state survey revealed that three states had already adopted restrictive policies similar to the Hyde Amendment, but were under court injunctions: Missouri, New Jersey, North Dakota. *Wulff v. Singleton*, 508 F.2d 1211 (8th Cir. 1976), *aff'd in part and remanded*, 428 U.S. 106 (1977) (this action was dismissed by plaintiffs, without prejudice, on July 1, 1977 as per *Beal v. Doe*, *supra*, and *Maher v. Roe*, *supra*); *Doe v. Klein*, No. 76-74 (D.N.J. Feb. 2, 1976) [preliminary injunction]; (D.N.J. June 27, 1977) [preliminary injunction dissolved in light of *Doe v. Beal, supra*] *aff'd* No. 77-2026 (3rd Cir., Jan 10, 1978); *Doe v. Myatt*, No. A3-74-48 (D.N.D., Jan. 27, 1975), (Oct. 30, 1976). Arizona is unaffected because it is the only state with no Medicaid program. *See* Janet Benshoof Aff., July 24, 1977. (R.48)

[10] *Alabama*: Special Alabama Medicaid Information Letter, FP-77-2 (August 25, 1977);

Arkansas: State of Arkansas, Dept. of Soc. and Rehabilitative Services, MSP-77-A/B-24 (August 8, 1977);

Connecticut: State of Connecticut, Dept. of Soc. Services, Health Services Bull. No. 58 (Aug. 19, 1977);

Delaware: Dept. of Health and Soc. Services, Release (August 5, 1977);

Florida: Florida Ad. Code, Emergency Rule 10-CER-77-36 (Amendment to State of Florida, Ad. Rules, Chapter 10C-738) (Sept. 1, 1977);

Georgia: GA. CODE ANN. § 96-4616 (1977) [state will not cover services for which it does not receive federal matching funds];

Some states could not choose to continue coverage since state law requires them to pay only for those

Indiana: Medicaid Division, State Dept. of Public Welfare, Memo (Aug. 9, 1977);
Kansas: State Dept. of Soc. and Rehabilitative Services, Secretary's L-192 (Dec. 1, 1977);
Kentucky: Bureau for Soc. Insurance, Dept. for Human Services, Hosp. Letter No. A-55, Phys. Letter No. A-56, Family Planning Letter No. A-3;
Louisiana: Office of Family Services, Dept. of Health and Human Resources, Physician Letter (Oct. 12, 1977);
Maine: Maine Dept. of Human Services, Revision of Medicaid Policy on Abortions, (Aug. 9, 1977);
Minnesota: Minn. Dep't of Public Welfare, Press Release (Sept. 23, 1977);
Mississippi: Mississippi Medicaid Commission, Memo, Restrictions on Medicaid Payment for Abortions (Aug. 8, 1977);
Montana: State of Montana, Economic Assistance Division, Soc. and Rehabilitation Services, Memo (Aug. 5, 1977);
Nebraska: Dept. of Public Welfare, Policy Statement (Sept. 1, 1977);
Nevada: State Welfare Assistance, State Assistance for the Medically Indigent (S.A.M.I.), Bull. No. 88;
New Mexico: Medical Assistance Manual § 319.2-0 (Oct. 1, 1977);
North Carolina: Division of Soc. Services, Dept. of Human Resources, Policy Statement (August 8, 1977);
North Dakota: Soc. Services Board, Memorandum, Oct. 20, 1977;
Ohio: Division of Medical Assistance, Dept. of Public Welfare, Medical Assistance Letter No. 64 (Sept. 8, 1977);
Oklahoma: State of Oklahoma Public Welfare Commission, Dept. of Institutions, Social and Rehabilitative Services Letter (June 2, 1978);
South Carolina: South Carolina Dept. of Soc. Services, Circular Letter No. 2320 (Aug. 18, 1977);
Tennessee: Dept. of Public Health, Official Notice (Aug. 9, 1977);
Texas: Texas Medical Assistance Program, Medicaid Bull. (Sept. 1977);
Utah: Office of Medical Services, Dept. of Soc. Services, Notice (Aug. 23, 1977);
Vermont: Agency of Human Services, Soc. Welfare Bull. No. 77-66 (Aug. 10, 1977);

services for which there is federal reimbursement.[11] Some adopted a facially more restrictive standard.[12] A few states continued to provide reimbursement at state expense for medically necessary abortions.[13] When the Hyde standard changed in 1978, many states changed along with it.[14]

Wyoming: State of Wyoming Division of Public Assistance & Soc. Services, Dept. of Health & Social Services, Memo No. M-205-77 (Sept. 26, 1977).

State policies were put into evidence at Pl. Exh. 258a-uu. State policies, regulations, and statutes following implementation of the Hyde Amendment have been lodged in a separate volume for the convenience of the court as Vol. I.

[11] *See* Georgia: GA. CODE ANN. § 99-4616; Texas Constitution, Article 3 § 51A; Delaware, House Bill No. 333, Appropriations FY ending June 1980, Sec. 19(a)(ii).

[12] Missouri, for example, limited abortion funding to situations where continuation of the pregnancy "would cause cessation of the mother's life." Mo. 13 C.S.R. 40-81.100 (1977). Rhode Island and Illinois also used a "preserve life" standard. Rhode Island, State of Rhode Island, Dept. of Soc. and Rehabilitative Services, Policy & Procedure to be Followed in Order to Determine Medical Necessity for Abortions (Oct. 1, 1977), P.A. 80-191; Ill. Rev. Stat. §§ 5-5, 6-1, 7-1 (Supp. 1977). In New Jersey a court injunction was lifted and a "preserve life" standard implemented. N.J.S.A. 30:406.1 *See Doe v. Klein*, *supra*.

[13] Alaska, California, Colorado, Hawaii, Idaho, Maryland, Massachusetts, Michigan, New Hampshire, New York, Oregon, Pennsylvania, South Dakota, Virginia, Washington, Wisconsin, and the District of Columbia.

[14] *Alabama*: State of Alabama, Medical Services Administration letter (Feb. 22, 1978);
Arkansas: State of Arkansas, Division of Soc. Services, Dep't of Human Services, Memorandum MSP-77-A/B-24 (Dec. 22, 1977);
Delaware: House Bill No. 888, Sec. 37(b)(iii). Appropriations for FY ending June, 1979 [state funds appropriated for medical assistance under Title XIX shall only be expended where federal matching funds are provided];
Georgia: GA. CODE ANN. § 99-4616 (1977) [state will not cover services for which it does not receive federal matching funds];

Indiana: State of Indiana, Dep't of Public Welfare, Ad. Bull. (Dec. 15, 1977);

Maine: Maine Medical Assistance Manual, Chapter III, Sec. 15, (Aug. 21, 1978);

Mississippi: Blue Cross/Blue Shield of Mississippi, Fiscal Agent Medicaid Program, Medicaid Bull. No. Phys./Hosp. 78-2 (April 18, 1978);

Montana: State of Montana, Economic Assistance Division, Soc. and Rehabilitation Services (Jan. 5, 1978);

Nevada: Nevada State Welfare Division, State Assistance for the Medically Indigent (S.A.M.I.), Bull. No. 97 (July 19, 1978);

New Mexico: State of New Mexico, Dep't of Human Services, Human Services Register, Vol. 1, No. 7 (June 26, 1978);

Ohio: Ohio Dep't of Public Welfare Medical Assistance Letter [M.A.L.] No. 71 (Jan. 5, 1978);

Oklahoma: State of Oklahoma Welfare Commission, Dep't of Institutions and Rehabilitative Services (Dep't of Public Welfare, Form letter);

South Carolina: South Carolina Dep't of Soc. Services, Circular Letter No. 2320-A (Feb. 24, 1978);

Tennessee: State of Tennessee Bureau of Medicaid, Dep't of Public Health, Official Notice (June 6, 1978);

Texas: Texas Agency Rules § 326.3612.021 (Aug. 18, 1978);

Vermont: Vermont Welfare Assistance Manual § 2461.7 (Nov. 1, 1978);

Wisconsin: State of Wisconsin, Division of Health, Dep't of Health and Soc. Services, Medical Assistance Provider Bull. MAPB-78-004-A, 005-B (April 5, 1978).

Iowa reimbursed for terminating pregnancies which were life-endangering, the result of rape, incest, or where the fetus was "physically deformed, mentally deficient or afflicted with a congenital illness." State of Iowa, Dep't of Soc. Services, Soc. Services Circular Letter 143 Med (No. 75) (May 30, 1978). California and Maryland also provided for abortions in cases of fetal defect. The California policy also covered: first trimester abortions for victims of rape; first and second trimester abortions for victims of incest, where the incident had been reported; first trimester abortions where two physicians had certified that there was a threat of severe and long-lasting health damage due to a specifically cited condition; and abortions for females under sixteen if their parents had been informed. California State Statutes of 1978, Chap. 359. The Maryland policy also allowed for abortions when the mother's life or health was threatened, and in cases in which the pregnant woman was the victim of sexual assault which had been reported. COMAR 10.01.02.04K.

Others retained the 1977 standard.[15] Still others adopted or retained more restrictive standards,[16] and a few continued reimbursement with state funds.[17]

Although the Hyde standard was unchanged in 1979, some states moved to more restrictive policies.[18]

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[15] Connecticut, Florida, Kansas, Nebraska, North Dakota, Utah, Wyoming. *See* n. 14, *supra*. Virginia went from funding all abortions to the 1977 Hyde standard. Virginia Dep't of Health, Memo: Abortions Covered by Medicaid (Dec. 12, 1977). Massachusetts, which had funded all abortions, restricted reimbursement to life-endangerment, rape, and incest. Mass. Stat. 1978, c. 367, § 2, Item 4402-5000.

[16] Rhode Island and New Jersey retained their 1977 "preservation of life standards; Missouri kept its "cessation of life" standard; and Kentucky and Louisiana enacted similarly strict laws. KY REV. STAT. § 205.510(3) (June 17, 1978); LA. REV. STAT. 40:1299.35. Pennsylvania and South Dakota, which had been funding all or medically necessary abortions, enacted statutes using "save the life" and "preservation of life" standards. Pa. Act No. 1978-148; S.D. COMP. LAWS ANN. § 28-6-4.5. Minnesota permitted reimbursement to "preserve life" and in cases of rape and incest.

Minnesota's policy allowed for reimbursement for abortions after rape, if the assault was reported within forty-eight hours after the victim became physically able to make the report, and after incest if the incident was reported prior to the time of the abortion. MINN. STAT. ANN. § 256B.02, Subd. 8 (1978).

[17] Alaska, Colorado, Hawaii, Idaho, Maryland, Michigan, New York, Oregon, Washington, D.C.

[18] Indiana adopted a "preserve life" standard less than a year after it adopted the 1978 Hyde standard. 1979 Ind. Acts No. 1414 P.L. 153, Sec. 1 [amending IC 16-10-3]. Idaho shifted from reimbursing for abortions "necessary to save the life or health" of the woman to the 1978 Hyde standard. Bureau of Medical Assistance, Idaho Dep't of H.E.W. § 3-1413. North Dakota changed from a life-endangering standard to a standard forbidding all public funds for performing or "promoting the performance, of an abortion unless the abortion is necessary to prevent the death of the woman." N.D. Cent. Code § 14-02.3-01 (1979). However, Florida in 1979 adopted the 1978 Hyde Amendment standards.

In 1980, several states followed the congressional lead and eliminated the "severe and long-lasting physical health damage" provision.[19] Only one state has substantially liberalized its abortion funding policy after restricting it pursuant to the first Hyde Amendment.[20]

States had no guidance from HEW which, until recently, refused to take a position on the effect of the Hyde Amendments on the states' underlying obligations under the Social Security Act.[21] Repeated inquiries from state officials and courts went unanswered.[22] In his comments on the regulations, Secretary Califano carefully noted that:

[19] *Alabama*: State of Alabama, Medical Services Ad., Memo (Oct. 25, 1979);
Arkansas: State of Arkansas, Division of Human Services, Official Bulletin (Dec. 17, 1979);
Delaware: House Bill No. 333, Sec. 19(a)(iii), Appropriations, FY ending June, 1980;
Georgia: GA. CODE ANN. § 99-4616 (1977);
Mississippi: Blue Cross/Blue Shield, Fiscal Agent Medicaid Program, Medicaid Bull. Nos. Hosp./Phys. 80-1 & 2 (Jan. 30, 1980);
Nevada: Nevada State Welfare Division, Medicaid Manual § 703.4 (Oct. 24, 1979);
New Hampshire: Division of Welfare, Medical Assistance § 9624.3 (Item 926) (Feb. 1979, SR-79-18);
Oklahoma: Oklahoma Public Welfare Commission, Dep't of Institutions, Soc. and Rehabilitative Services (Dep't of Public Welfare Form Letter);
Texas: Texas Agency Rules § 326.3612.021 (1980);
Vermont: State of Vermont, Agency of Human Services, Dep't of Soc. Welfare, Memo (Dec. 7, 1979).

[20] North Carolina Ad. Code, Human Resources—Individual and Family Support, Subchapter 42W.0001.

[21] It is the current position of HEW that Title XIX of the Social Security Act requires states to reimburse for all medically necessary abortions, as long as federal reimbursement is available. *See* U.S. Brief, *Williams* v. *Zbaraz*, No. 79-4, n. 23 at 43.

[22] In April, 1978, HEW advised a Maryland state legislator that it had not yet determined whether the states were obligated to fund all medically necessary abortions (Pl. Exh. 274 A & B). Responding to another inquiry from Nebraska, the Department stated that it had no position concerning a state's right to implement a policy more restrictive than the Hyde standards. (Pl. Exh. 275 A & B).

> These regulations only govern the instances where federal funding is available for abortions and other medical procedures. They do not deal with the separate question of circumstances under which a state must fund abortions under the Medicaid program. 43 Fed. Reg. 31868, 31875 (1978).

No administrative actions were ever taken by HEW against those states which restricted coverage beyond the then current Hyde Amendment.

Litigation has, to a considerable extent, changed the pattern of state funding. Of the 23 states which were reimbursing for all, or all medically necessary, abortions before the nationwide injunction issued by the district court went into effect, 14 were doing so under a court injunction.[23] On March 10, 1980, the Tenth Circuit struck down the restrictive Utah statute and ordered funding of all medically necessary abortions. *D. R. v. Mitchell*, No. 78-1675 (10th Cir., March 10, 1980).

[23] Calif.: *Committee to Defend Reproductive Rights v. Cory*, S.F. No. 24053 (Cal. Sup. Ct., Sept. 20, 1979) (staying operation of restrictive statute); Conn.: *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405 (D. Conn., Jan. 7, 1980); Ga.: *Doe v. Busbee*, 471 F. Supp. 1326 (N.D. Ga., 1979); Ill.: *Zbaraz v. Quern*, 469 F. Supp. 1212 (N.D. Ill. 1979), *appeal granted juris. postponed*, *Williams v. Zbaraz*, *Miller v. Zbaraz*, *U.S. v. Zbaraz* (Nos. 79-4, 5, 491), 48 U.S.L.W. 3356 (Nov. 26, 1979); La.: *Emma G. v. Edwards*, No. 77-1342 (E.D. La., Nov. 27, 1978); Mass.: *Preterm Inc. v. Dukakis*, 591 F.2d 121 (1st Cir. 1979), *cert. denied* No. 78-430, 99 S. Ct., 2182 (1979)); Minn.: *Hodgson v. Board of County Commisioners*, 3 Medicare & Medicaid Guide (CCH)

3. The Impact of the Hyde Amendment Has Been to Limit Medicaid Abortions, in a Random Manner, to Only 1% of Those Poor Women Who Obtained Them Prior to Its Implementation.

The Hyde Amendment has had a devastating effect on a significant number of poor women for whom an abortion is medically necessary because their pregnancies threaten their lives and health. *See* Section C.5, *infra*. The trial court found that where restrictive standards have been implemented, the vast majority of medically necessary abortions have been excluded from Medicaid coverage and abortion has been relegated "... to a procedure limited to crisis intervention in cases with fully developed symptoms. . . ." [24] Slip op. at 158-59.

The data from states which have implemented a Medicaid standard more restrictive than "medically necessary" shows that since fiscal year 1976—the last year Medicaid monies were provided for all or most

¶ 30,159 (8th Cir. Jan. 9, 1980)(No. 79-1665); Mo.: *Reproductive Health Services v. Freeman*, 3 Medicare & Medicaid Guide (CCH) ¶ 30,160 (8th Cir., Jan. 9, 1980)(No. 79-1275); Neb.: *Orr v. Nebraska Dept. of Public Welfare*, Civ. No. 80-031 (D.Neb. Jan 25, 1980); N.J.: *Right to Choose v. Byrne*, 398 A. 2d 587 (N.J. Super. Ct. Ch. Div. 1979); Ohio: *Planned Parenthood Affiliates v. Rhodes*, 477 F. Supp. 529 (S.D. Ohio 1979); Pa.: *Roe v. Casey*, 464 F. Supp. 487 (E.D. Pa. 1978); W. Va.: *Smith v. Ginsburg*, No. 75-0380 CH (S.D.W. Va. May 9, 1978); Wis.: *Doe v. Percy*, 476 F. Supp. 324 (W.D. Wisc. 1978).

[24] Brief of the United States in *Williams v. Zbaraz*, n. 30 at 59, states that ". . . it is unwarranted to assume . . . that a pregnant woman must actually be near death before she can receive Medicaid funds for an abortion." The statistics presented in this case prove, and the district court so found, that such an assumption is absolutely correct. Slip op. at 58-61. *See* Pl. Exh. 24, p. 209; Pl. Exh. 177/T.4879, A.289, A.141-45.

abortions—the number of funded abortions has decreased 98-99%. (Pl. Exh. 177/T.4879, A.289.) For all states, the approximate number of federally funded abortions went down from 260,800 in 1976 to about 2,767 in 1978, a decrease of 99%.[25] (Pl. Exh. 24, p. 209/T.1534., A.262; A.143.) For the last quarter of 1978, 28 states, Puerto Rico, and the District of Columbia reported *no* abortions qualifying for federal reimbursement under the 1978 Hyde standard. (p. 5, A. 142.) The evidence shows that the precise wording of the restrictive standard is virtually irrelevant. The statistics confirm the medical testimony that under the Hyde standard, or any standard more restrictive than "medically necessary", [26] the number of Medicaid abortions will be drastically reduced. (Jaffe, T. 4873.) Even women who would qualify under the restrictive standards will not actually be covered because the standards are unclear to physicians. Slip op. at 322-23.

Statistics from 22 states which reported Medicaid abortions for the last quarter of 1978 show that seven states, reporting 130 of the 780 Medicaid abortions, reported none under rape or incest and none under severe and long-lasting physical health damage.[27]

[25] HEW statistics report 2421 abortions from Feb. 14, 1978 to Dec. 31, 1978. The annual number would then be about 2,767. (A.143)

[26] A broad construction of the term life-endangerment to include health considerations by the State of Virginia (*see Doe v. Kenley*, 584 F.2d 1362 (4th Cir. 1978) has made no difference whatsoever. For 1978 Virginia reported only nine Medicaid abortions (A.144). a decrease of 99.8% from 1976 when Virginia covered 5,200 Medicaid abortions. (Pl. Exh. 24, p. 209/T.1534, A.262.)

[27] The fear was expressed in Congress that the elimination of "forced" before "rape" would lead to widespread use by teenagers who would qualify under statutory rape. Annex to slip. op. at 212,

(A.141.) Illinois, reporting 59 abortions over three months, assigned 15 to life endangerment, 41 to severe and long-lasting health damage, and three to rape and incest. Illinois accounted for 47% of the cases assigned to severe and long-lasting health damage in the last quarter of 1978. Slip op. at 60.

These statistics support the trial court's finding that the Hyde standard, indeed any standard other than "medically necessary," is so unworkable that it limits Medicaid abortions to crisis situations, and does not even provide funded abortions for the few women intended to be covered. Slip op. at 99-100, 159, 322-23.

4. Plaintiff Class Members, for Whom Abortion Is Medically Necessary, Have Suffered Increased Health Risks Because of the Hyde Amendment.

Plaintiff class members include Medicaid-eligible women for whom abortions are medically necessary, but who do not qualify under the Hyde Amendments. (A.59-61.)

In 1976, HEW estimated it financed between 250,000-300,000 abortions. Slip op. at 14. The number of poor women who wanted abortions but could not get them was undoubtedly higher.[28]

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281. 123 Cong. Rec. H 10834 (daily ed. Oct. 12, 1977), 123 Cong. Rec. H 12489 (daily ed. Nov. 29, 1977). The statistics show this fear was unfounded. In the fourth quarter of 1978, there were only 25 rape and incest abortions reported in the entire country, 14 were from Oregon. (A.141.)

[28] One HEW official estimated that in 1973, there were probably over 1 1/2 million unwanted pregnancies of Medicaid women annually; this represents almost half of all welfare recipients of childbearing age. (Pl. Exh. 214, p.9) Slip op. at 15.

The number of these pregnancies which present a health risk to the woman is unknown, but substantial.[29] (See Section C-5, *infra*.) The limited data at the time of trial showed that the impact of the Hyde Amendments has been to cause increased risks to life and health.

An article published by doctors working at the United States Center for Disease Control (CDC) estimated that if publicly-funded abortions were restricted in all states, from 5 to 90 excess deaths would result for poor women of childbearing age in the United States each year. (Pl. Exh. 240, p. 6, A.296.) The analysis was based on increased mortality risks which accompany each of the three alternatives available to poor women: delay in getting money to pay for a legal abortion; choosing a non-legal abortion; or choosing to carry a pregnancy to term. This article does not deal with the increased risk of serious complications due to illegal abortion (estimated to be about 100 times the number of deaths from illegal abortions)(Tietze, A.200), nor the effects on health of carrying a complicated pregnancy to term.

The full impact of the funding restrictions on the plaintiff class is unknown for several reasons. First, funding restrictions have affected only about 20% of the plaintiff class, since the most populated states have thus far continued funding.[30] Second, there is no com-

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[29] The plaintiffs-appellees' in *Williams v. Zbaraz* point out that under a medically necessary standard in 1978, Illinois funded about 10,666 abortions, less than 50% of the number it had funded in 1977, (21,663), when both elective and medically necessary abortions were reimbursed (Brief of Appellees, at 7).

[30] The number of women at risk has varied greatly because court orders and states on their own, have changed policies. (See Section

plete reporting system for complications arising from illegal abortions, as there is for Medicaid deaths.[31] Further, since reporting and investigation on abortion deaths can take up to 24 months (Pl. Exh. 260, p. 6), and the increased mortality of women forced to carry complicated pregnancies to term takes months to ascertain, that data has not yet been compiled.[32] The CDC noted that, in 1977, "for the first year since 1972, there was an increase in the annual number of illegal abortion deaths." Slip op. at 70. (Pl. Exh. 260, p. 15.)

C-3, *supra*.) Although, 23 states and the District of Columbia were funding, as of February 19, 1980, because so many of the injunctions are recent, the figure of 20% is more accurate when gauging impact.

[31] The trial court found, upon examination of all available data, that the extent of hospitalizations resulting from botched illegal abortions was "indeterminate." Slip op. at 74. Defendants provided information on a 24-year-old black woman who, in her 12th week of pregnancy, unsuccessfully sought an abortion in South Carolina. She could not obtain one because she could not afford the fee, and was aborted illegally in February 1978, apparently in her 16th week, when mortality risk is much higher. She was later hospitalized for post-abortion complications that necessitated a hysterectomy, rendering her sterile. Slip op. at n.27. (R.122, pp.4-6.)

[32] There is some evidence of increased childbirth, *see* Brief of Appellees in *Williams v. Zbaraz*, at 18-19, footnote. In *Women's Health Services Inc. v. Maher*, Civ. No. H-79-405, (slip op. at 13) (D. Conn. Jan. 7, 1980), the trial court made a finding of fact that, in one sample, 37% of those women seeking medically necessary abortions in Connecticut were "forced to carry their abnormal pregnancies to term." On the other hand, the trial court in this case found that "in Romania, where abortion was sharply restricted commencing in November 1966, the effect was a drastic increase in hospital admissions for complications arising from illegal abortion and a sharp increase in abortion-related maternal deaths; a short-term increase in birth rate was followed by a decline in birth rate, ascribed by Tietze and Murstein to resort to 'folk methods of contraception and illegal abortion.'" Slip op. at 67-68. (Pl. Exh. 13, p. 65/T.1040.)

CDC concludes that the implementation of the Hyde Amendment may have been responsible for several deaths, and was certainly responsible for the death in 1977 of a Mexican-American woman who had had two previous Medicaid abortions.[33] She resorted to obtaining a low-cost abortion from a lay midwife on September 16, 1977, about a month after Texas implemented the Hyde Amendment. Despite intensive care, she died in imminent septic shock. Slip op. at 71.[34]

The trial court found that the risk of serious complications increases 20% and the risk of death increases 50% for each week abortion is delayed (slip op. at 65), and that Medicaid-eligible women who eventually obtained abortions in non-funding states did so only after delay, thereby increasing risks:

> The evidence requires the conclusion that the consequence of the legislation has been at the very minimum to delay abortions with the serious consequence of increasing maternal mortality risks,

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[33] The draft summary of the 1977 report states:

> Public policy decisions may have created an environment of uncertainty for low-income women about the availability of legal abortion services, whether they lived in states which were continuing public funding for abortion or those which were not. However, because of the small numbers involved, chance fluctuation of a rare event is a possible explanation for this increase in illegal abortion-related deaths. Moreover, for at least one woman, the non-availability of public funds led to a situation in which was forced to choose the less safe, illegal abortion because of financial factors. (Pl. Exh. 260, p.14.) Slip op. at 72.

[34] Plaintiffs ask this Court to take judicial notice of the fact that, subsequent to the trial in this case, CDC found four illegal abortion deaths relating to the Hyde Amendment. *See* Associated Press article, Boston Globe, February 12, 1980, p. 3. A copy of this article is attached to plaintiffs' papers in opposition to defendants' motion for a stay, February 12, 1980.

that the restrictions on funding have in fact caused some resort to illegal abortion, although the extent of that is not measurable, and that in fact Medicaid-eligible women who wish to terminate their pregnancies have no significant alternative to Medicaid for obtaining abortion.[35] Slip op. at 158.

5. The Hyde Amendment Standard Does Not Cover the Vast Majority of Medical Problems which May Make Abortion Medically Necessary.

The trial court found, in exacting detail, that the Hyde Amendment standards, whether life-endangering or, as in 1978 and 1979, life endangering plus severe and long-lasting physical damage, "do not include but exclude the greater part of the cases in which the profession would recommend abortion as medically necessary procedure to safeguard the pregnant women's health." Slip op. at 308. The denial of medically necessary abortions does not and cannot further any interest in "normal" childbirth and exacts a toll on poor women in terms of the effect on their lives and health. Slip op. at 311, 158.

It is undisputed that pregnancy represents a greater than normal risk of morbidity and mortality for some women than for others. Slip op. at 88-9. Whether the

[35] Delay caused by trying to raise the money involves more than increased risks to the woman's life or health. One court recently found that, of 144 poor women seeking abortions, the 63% who were able to raise the money did so by "not paying rent or utility bills, pawning household goods, diverting food and clothing money or journeying to another state to obtain lower rates or fraudulently using a relative's insurance policy . . . some patients were driven to theft." *Women's Health Services, Inc. v. Maher*, Civ. No. H-79-405 (slip op. at 14) (D. Conn. Jan. 7, 1980).

risks are such that, considering all factors,[36] an abortion is medically necessary, is ". . . inescapably a medical question that must be resolved in terms of many variables of time, of patient's will, of patient's medical history, of patient's family situation, and of the patient's mental health and her age." Slip op. at 160.

a. Physical Factors Cause High Risk Pregnancies.

There are numerous pre-existing conditions and complications which occur because of pregnancy which may be important factors in determining an abortion to be medically necessary, but which cannot be certified under Hyde standards.[37] The result is that women's health is sacrificed, and doctors are forced to forego exercising their best medical judgment.

Plaintiff Jane Doe is a 25-year-old woman with four children. Following the birth of her third child, she developed a serious case of phlebitis, which had required lengthy hospitalization. (Doe Aff., § 3, A.109; Hodgson Aff., § 3, A.111,195.) Continuing her pregnancy would greatly aggravate that condition and increase the risk of blood clots to the lung. (Hodgson,

[36] For a complete list of 84 factors compiled by eminent obstetricians to be considered in whether pregnancy or childbirth will have a higher than normal risk, plaintiffs submitted into evidence criteria used by the Maternity Center Association, an out-of-hospital birthing center in New York. (Romney, T./ 1138.) A cumulative score of two points made women unacceptable for the program and women were reevaluated throughout their pregnancies. (Pl. Exh. 18/T. 1138) The trial court found the list to "traverse the range of factors that can at varying intensity levels become indications for termination of pregnancy." Slip op. at 94-5.

[37] *See* Brief *Amici Curiae* of Planned Parenthood Federation of America, *et al.* filed jointly in *McRae v. Harris* and *Williams v. Zbaraz*, at 14-29.

A.195.) Moreover, drugs to treat the clotting are dangerous to the fetus. (A.195.) Although her doctor felt an abortion was medically necessary, she could not certify that Jane Doe's life would be endangered if the pregnancy were carried to term (A.195.) Slip op. at 96-7.

Plaintiff Doctor Bingham described a 16-year-old mother of two with rheumatic heart disease. Although he felt her pregnancy would aggravate the condition, it would not threaten her life. Slip op. at 111. Another member of the plaintiff class, from Minnesota, patient "X", was 18 when her doctor applied for a Medicaid abortion for her in December, 1977, under Minnesota's 1977 Hyde standard.[38] (A.114.) Patient X is and was a victim of juvenile rheumatoid arthritis, and had been so incapacitated she had been tutored at home her last two years of high school. In 1977, she had had a child by caesarean section and had been incapacitated during most of the pregnancy. Patient X was on several drugs for her arthritis, at least one of which is contraindicated during pregnancy. (Hodgson Aff., 1/4/78, A.119) Despite letters from two doctors and an evaluation from the Mayo Clinic, her abortion request was denied. (A.116.)

Another plaintiff, Susan Roe, was 19 when she became pregnant, only four weeks after having had her first child. Although her doctor felt that an abortion was medically necessary for both mental and physical reasons, since the short interval between pregnancies increases risk of premature labor or low lying placenta, the doctor could not certify her under either the life

[38] No pseudonym was used by this class member, whose case and supportive documents are in Appendix at 113-21.

endangering or the severe and long-lasting physical health damage standard. (Hodgson, A.122, 127.)

Diabetes is another condition which, if uncomplicated, is possible to treat, but which requires a complete evaluation of the total environment of the woman. A report by the British Medical Association on indications for termination of pregnancy concludes: "In a woman with severe diabetes who already has two or more children, increase in family responsibilities through further pregnancies will complicate seriously the proper control of her diabetes." (Pl. Exh. 3, p. 173-4/T. 55.) Although a diabetic woman is not likely to die from pregnancy, on the average, each pregnancy potentially shortens the life of a severe diabetic by five years. (Hodgson, T. 66.) Dr. Eliot testified about a Medicaid patient, a 14-year-old deaf woman with juvenile diabetes. (A.165.) Because of the increased risks due to her diabetes and age, Dr. Eliot regarded the abortion as medically necessary but not certifiable under the Hyde life endangerment standard. (A.165-66.)[39]

Cancer is another condition where an abortion may be medically necessary, but there is debate as to whether pregnancy would actually endanger the woman's life. Slip op. at 105-06. It is clear, however, that chemotherapy and radiation therapy have to be stopped since they damage the fetus.[40] Slip op. at 106. (Rothchild, T-804; Pl. Exh. 3, p. 174/T. 55.)

[39] One possible complication from diabetes aggravated by pregnancy is blindness, which had happened to one of the witnesses' patients. (Hodgson, T. 87.)

[40] Brief of *Amicus Curiae* Planned Parenthood Federation of America, *et al.*, *Williams v. Zbaraz* at 16.

Another common problem is presented by women who become pregnant with an intrauterine device ("IUD") in place.[41] If pregnancy continues, the risk of death from a spontaneous uterine infection, while still statistically small, increases 50-fold. (Pl. Exh. 213, p. 41.) Slip op. at 104. If it occurs, generally late in pregnancy, it is overwhelming and usually untreatable; a patient may die within 48 hours. (Hodgson, A.197.) Seventeen women died from this between 1972 and 1974. (Pl. Exh. 16, p. 5/T.970-71.) The Food and Drug Administration has issued regulations directing that abortion be offered as an option when pregnancy occurs with an IUD in situ and removal is difficult. 21 C.F.R. §§ 310.502, 801.427. (Hodgson, A.196.) HEW has made this same recommendation. (Pl. Exh. 213, p. 42.) All witnesses agreed that in such instances abortion is medically necessary, and in fact approximately two-thirds of the pregnancies occurring with an IUD in the uterus have been terminated by first trimester abortions. (Pl. Exh. 16, p. 5/T. 970-71.) However, because it is impossible to predict what would happen to any particular woman later in her pregnancy, doctors cannot certify women with IUD's in place under the life endangerment standard.[42] Slip op. at 104, 110. (Eliot, A.164.) Doctors are therefore placed in the professional dilemma of being required by federal regulation to tell their Medicaid patients that, although

[41] Pregnancy occurring with use of an IUD is not uncommon. One study found 8-12% of women became pregnant during the first year of IUD use. (Pl. Exh. 27, p. 140/T.1567.)

[42] Dr. Eliot testified, "I would have to classify such a case [pregnancy when the IUD cannot be removed] on a statistical basis as preserving her health rather than an imminent threat of danger to her life if she continued the pregnancy." (A.164.)

abortion is the recommended treatment, it will not be a covered medical procedure.

Malnutrition (slip op. at 102, Pl. Exh. 3/T.55); anemia (slip op. at 102, 108); heart disease (Pl. Exh. 3, p. 171/T.55); sickle cell anemia (slip op. at 108); cancer (slip op. at 105-06, Pl. Exh. 3, p. 174/T.55); urinary infections (slip op. at 107); phlebitis (slip op. at 104-05); and benign tumors (slip op. at 106-07) are all tions which, depending on a woman's total circumstances, including her motivation and cooperativeness, may make an abortion medically necessary.[43] Another important example is hypertension. Although three out of four hypertensive women can have successful pregnancies (Pl. Exh. 3, p. 172/T.55), the disease itself, even after treatment, entails a seven times higher risk of developing pre-eclampsic toxemia—one of the leading causes of maternal mortality. (Pl. Exh. 3, p. 172/T.55; Sloan, A.173; Romney, T.3968.) The trial court found that physicians cannot certify any of these complications of pregnancy for abortion under the life endangerment or severe and long-lasting physical health damage standards in the 1978 and 1979 Hyde Amendments,

> . . . because of the special nature of the life and health risks that all pose in some degree of their occurrence, and at some stage of gestation. The supporting data for safe certification cannot be at hand at the time when professional judgment would approve a termination of the pregnancy as "medically necessary," as that term is understood in the medical profession. Slip op. at 110.

[43] The trial court gave examples of physical conditions that can become life threatening, but which cannot be predicted early in the pregnancy:

(footnote continued on next page)

b. Emotional and Psychological Factors Cause High Risk Pregnancies.

Plaintiffs presented uncontested evidence about the devastating psychological and emotional effects unwanted pregnancies have on many women, and which may make abortion medically necessary.

The trial court found that the evidence demonstrated

> the impact of unwanted pregnancy on mental health, both in gravely aggravating mental ill health that existed before the pregnancy, and in producing severe mental disturbance, including suicidal ideation, in the case of patients in trying life circumstances who are already near the limits of endurance. Slip op. at 116.

But the Hyde Amendments do not authorize abortion to avoid even certain and serious and long-lasting psychological damage.[44]

Pregnancy can aggravate myoma: if the tumor grows beyond the vascular supply needed to keep it benign, the tumor may become necrotic and produce peritonitis, abscess formation, infection and so become life-threatening. Urinary tract infections, too, are not uncommon, but, Dr. Romney testified, the possibility of an ascending urinary tract infection is increased during pregnancy; if it remains a mild cystitis, that is, a localized bladder infection, it may not be dangerous; but if a virulent infective organism produces a severe cystitis, that can develop into a renal abscess, and, in a patient with a large pregnant uterus, prevent proper drainage, seriously threaten control of the infection and so jeopardize the woman's life. Slip op. at 107.

[44] Congressional debate surrounding the adoption of the 1978 and 1979 Hyde Amendments, which allowed for "severe and long-lasting physical health damage," makes clear that all mental health concerns were to be excluded. Slip op. at 123; Annex to slip op. at 236, 244, 247.

Plaintiff Ann Moe was 15 when she applied for a Medicaid abortion in January, 1978. She had spent most of the preceding three years in adolescent psychiatric wards and correctional institutions, and was diagnosed schizophrenic. Dr. Hodgson believed an abortion was medically necessary because not only was the patient at higher physical risk due to her youth, but also continued pregnancy would result in serious mental health damage. Yet she could not certify Moe under the Hyde Amendment. (Hodgson Aff., A.113.)

Although an unwanted pregnancy is stressful for anyone, for the psychiatrically disturbed the danger of breakdown is greater, and patients who are under treatment can become psychotic and regressed, particularly if medication is discontinued because it may cause a developmental defect in the fetus.[45] Slip op. at 119. (Belsky, T.3520-21.)

One Medicaid patient whose pregnancy threatened her recovery was a 33-year-old mother of three children who was hospitalized in a state mental hospital. (Eliot, A.162.) She got pregnant on a weekend furlough, despite using a diaphragm. Although she obtained a Medicaid abortion and her mental health continued to improve, her doctor testified that he would not have been able to certify her under the life endangerment standard.[46] (Eliot, A.163.) Another woman,

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[45] One study of 21 women hospitalized in a psychiatric ward found that the vast majority reporting an unwanted pregnancy felt continuing it and caring for children had contributed to their decompensation. Grunebaum, et. al., The Family Planning *Attitudes, Practices and Motivations of Mental Patients*, 128 Amer. J. Psychiatry, 470 (1971). (Pl. Exh. 160/T.3633.)

[46] Another example of a woman whose pregnancy represented a set back in her mental health was 19 when she applied for an abortion. From the age of 12 to 16 she had had an incestuous

described by her psychiatrist as "paranoid schizophrenic" (Pl. Exh. 159/T.3601, A.280.) became psychotic because of her unwanted pregnancy, and exhibited physical symptoms such as constant vomiting, causing a weight loss of 18 pounds. Another woman who was retarded, had four small children she could not cope with and thought of burning herself and them up. The thought of another child led her to attempt jumping from the roof. (Pl. Exh. 156/T.3590, A.278.) She obtained an abortion because her doctor described her as suicidal and homicidal, but it is not clear that she could be certified under the Hyde standard.

The trial court made findings, overwhelmingly supported by the evidence, that for some women the unwanted pregnancy itself can produce severe psychiatric problems.[47] Slip op. at 120-22. Medicaid-eligible women are more exposed to stress, and thus more susceptible to mental illness caused by stress, than are others.[48]

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relationship with her father. At 16 she became pregnant, delivered a baby at home alone, and threw it in the garbage. She began using heroin to alleviate her guilt and depression. With psychiatric treatment in a residential center, she was able to improve to the point that she started college. As a result of her new unwanted pregnancy, her mental health started to deteriorate, with serious feelings of guilt and self-hatred. (Pl. Exh. 151/T.3594, A.273.)

[47] The President's Commission on Mental Health, Subpanel on Mental Health of Women underscored the issue of reproductive freedom "because of particular importance to the prevention of mental disorders among women" (p. 1078) and recommended Medicaid funding for abortion be resumed (p. 1099). (Pl. Exh. 257.) Slip op. at 121.

[48] Dr. Belsky described one woman who developed an anxiety neurosis because of all the rats in her dilapidated apartment. Despite her efforts at cleaning, there were rats and rat feces all over. Her five-year-old son could not sleep by himself because he was so frightened. (T.3623, A.186.)

(Belsky, A.185.) For one woman with three children whose husband had been murdered the month before she discovered she was pregnant, the pregnancy was the breaking point.[49] (Pl. Exh. 159-c/T.3601, A.283.)

It is very difficult for doctors to assess threats of suicide (Eliot, T. 484), and applications on that ground under the pre-1973 criminal abortion statutes were largely approved only for private patients. (Pl. Exh. 142/T.3529; Pl. Exh. 143/T.3529; Belsky, T.3533; Tietze, T.989-90.) Slip op. at 85-6. Yet it is equally clear that the stress of an unwanted pregnancy makes poor women all the more desperate. (Belsky, A.187.) Threats to their lives, either by suicide or by dangerous self-abortions, have been and continue to be common.[50]

Although doctors would probably be able to reach a consensus on an evaluation of the effect of an unwanted pregnancy on a particular woman's mental health, a certification that her life would be en-

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[49] Plaintiff Mary Doe, at the time of her abortion application, was a 19-year-old Connecticut woman who had four small children. Her doctor testified that she was so desperate about her pregnancy that if she could not get a legal abortion, she would try to abort herself and risk permanent damage. Even if he would do the abortion she was in the second trimester and could not be admitted to the hospital without prior medical approval. (A.182-83.) Dr. Bingham did not think he could certify her under the Hyde standard. (A.107-08, 183.) However, he could certify her under a standard of medical necessity. (A.183.)

[50] One unpublished study by Dr. Belsky consisted of interviews and follow up of 90% of the poor women who got abortions at Bellevue Hospital in 1969-70. (Pl. Exh. 144/T..3538, A.267.) Before the Therapeutic Abortion Committee was abolished, out of 204 patients, 77, or 37.7% attempted either an illegal or self-induced abortion. (Pl. Exh. 147/T.3554, A.269.), and 23 out of 204 or 11% tried to commit suicide (Pl. Exh. 148/T.3554, A.270.) Before abortion was legalized, nationally about 18% of all maternal deaths were due to abortion. In 1965 there were 235 deaths. Slip op. at 10.

dangered would arbitrarily depend on a doctor's view of whether to cerify what is statistically a remote possibility, at least for a general population. (Eliot, A.161-63; Hodgson, A.68-68a, 112, 146; Romney, T.1124-25, 3970-71; Pisani, T.2216; Tietze, T.899; Belsky, T.3532.) *See* Slip op. at 123.

Medical studies document that being forced to continue an unwanted pregnancy can be a major factor contributing to mental illness in women.[51] A woman's psychological and emotional response to an unwanted pregnancy causes physical risks, just as mental or emotional factors can cause such symptoms as asthma or ulcers. (Sloan, A.170.) Aside from suicide and self-abortion attempts, both unquestionably risky to health and life, other psychosomatic illnesses occur, such as hyperemesis, excess vomiting so severe as to require hospitalization.[52] (Sloan, A.168; Pl. Exh. 159/T.3601, A.280.) *See also* slip op. at 109-10.

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[51] A British study comparing women who requested an abortion and were turned down with those who were permitted to terminate their pregnancies concluded: ". . . the stress of bearing an unwanted child can lead to psychiatric symptoms. In our series such symptoms were not uncommon, were sometimes protracted and were occasionally severe enough to require admission of the patient." The study also found that "patients in whom pregnancy was terminated on our recommendation had remarkable little psychiatric disturbance." Pare, *et. al., Follow-Up of Patients Referred for Termination of Pregnancy,* The Lancet, March 28, 1970, (Pl. Exh. 162, pp. 637-38/T.3633.) *See also,* Romney, T. 1121-23, 3940, 3945; Belsky, T.3618, 3689-91. Slip op. at 143-44.

[52] Dr. Sloan, Director of Psychosomatics in the Department of Obstetrics and Gynecology at New York Medical College, defined a psychosomatic condition as an "organic symptom that has manifested itself in its causation or etiology in the psyche or mental aberration." (Sloan, A.170.)

Hypertensive states of pregnancy, a leading cause of maternal mortality (Sloan, A.172.), is known to be exacerbated or caused by stress.[53] Another not uncommon symptom is excessive starch intake which in turn causes severe anemia. (Sloan, A.169.) Childbirth itself can become much more dangerous when the pregnancy is unwanted.[54] In describing the impact of unwantedness, the trial court, relying on Dr. Romney, stated:

> [T]he prognoses for wanted and unwanted pregnancies are different, and that the woman's failure in attitude, cooperation and motivation can result in the evolution of potential complications into reality; . . . labor of women whose pregnancies were unwanted was almost physiologically different from normal labor, and that the apprehensive, tense unwanting woman adjusted poorly to the delivery room, her tensions stimulating, experimental data suggest, the production of epinephrine (a hormone secretion of the adrenal gland) which inhibits the uterine contraction. Slip op. at 112. (T.1084.)

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[53] Testimony related a statistical analysis showing a much higher incidence of preeclampsia (hypertension) among women who were seen in the psychosomatic clinic at Flower Fifth Avenue Hospital in comparison with other obstetrical patients. (Sloan, A.173.)

[54] Several witnesses testified that they had delivered babies for women at various Florence Crittenton Homes for Unwed Mothers, where there was a higher incidence of abnormal labor and caesarean sections. (Romney, T.1060-61; Sloan, A.174-75.)

c. Most Pregnancies Caused by Rape and Incest Are not Covered by the Hyde Amendment.

The 1977 Hyde Amendment specifically excluded federal funds for pregnancies resulting from rape or incest. Subsequent versions, as interpreted in HEW regulations, allow reimbursement only if the crime is reported within sixty days. 42 C.F.R. 441.205(a)(3) (1978).

Uncontested evidence proved that incest is alarmingly common, that incestuous relations usually continue over a period of time, and that the child victims are unlikely to report the crime promptly. Slip op. at 155-57. Pregnancy occurs in 20-25% of the reported cases of incest. (Sarles, T.3752.)

The trial court found that most pregnant rape victims are effectively denied Medicaid abortions because:

> The very young, those in fear of retaliation, those inhibited by a natural revulsion from recounting what happened, and those who fear unsympathetic and uncomprehending treatment by the authorities tend not to report rape to law enforcement agencies or to public health services. Slip op. at 151.
>
> Similarly with regard to incest, the trial court found:
>
> In the case of incest, the 60-day report requirement is inherently likely to restrict the availability of funding to a minor fraction of the total number of cases. Slip op. at 156-57.

The devastating effects of unwanted pregnancy resulting from rape or incest were undisputed. *See* slip op. at 151-57.[55] The data on certifications under the Hyde Amendment make plain that only a very small proportion of poor women, pregnant as a result of rape[56] or incest, have met the requisite reporting requirements for a federally funded abortion. Slip op. at 59, 151.

d. Familial Considerations, Including the Effect of Diagnosed Fetal Deformities, May Make Abortion Medically Necessary.

Familial considerations are part of a doctor's total evaluation of the effect of a woman's pregnancy on her health. They are also a consideration in whether a woman can follow an alternative form of treatment, such as bedrest. Dr. Eliot described a Medicaid patient who was pregnant because of contraceptive failure. She was 30 years old and had two mentally retarded children. She wanted an abortion because she feared

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[55] The mental strain on incest victims is aggravated by the fact that their offspring have a high likelihood of deformity and/or death, even if the parents are normal. The only available study (Sarles, T.3765) shows that out of 18 children of incest, 11 died or suffered some deformity, including spastic cerebral palsy, cleft palate, and mental retardation. *See* Pl. Exh. 167, Adams, *et. al.*, *Children of Incest*, Pediatrics, Vol. 40, No. 1, July 1967, p. 59.

In the case of unwanted pregnancy resulting from rape, abortion is the preferred medical treatment to prevent possible suicide or drug use by the victim in an effort to rid herself of an unreasonable sense of guilt and self-punishment mixed with the desire to be rid of the product of the assault. Slip op. at 153-54. (Bard, T.1274.)

[56] Victims of statutory rape, such as plaintiff Ann Moe, are unlikely to report the act. (Ann Moe Aff. ¶ 1, 5, A.125-26; Hodgson Aff., 1/4/78, ¶ 3, 4, 10, A.113-14.) Testimony showed that teenagers, because of menstrual irregularities and ignorance, are unlikely even to know they are pregnant within 60 days of intercourse. (Romney, T.3974.)

her next child would also be retarded, and because she did not believe she could cope with the burden of an additional child, even if it were normal. Dr. Eliot testified that although he believed abortion was medically necessary for this woman and necessary for "her family's mental and physical health . . . [i]n no way was her life endangered by her pregnancy." (A.163.) Slip op. at 118.

Family circumstances can be so overwhelming[57] that not only the woman's health, but the health of her children is at stake.[58] (Pl. Exh. 159/T.3601, A.280.) Witnesses testified to patterns of child abuse exacerbated by an additional pregnancy.[59] (Belsky, T.3582-83, 3591-92.)

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[57] One witness described a patient who had eight living children ranging from 2 to 19 years old. A ninth child died in an accident. The 19-year-old, who was severely retarded and epileptic, was unable to walk or speak. The 17-year-old had been emotionally disturbed since age four and beat his mother and siblings. The 6-year-old had a heart murmur; the 5-year-old had a congenital cardiac condition which required surgery; the 4-year-old was asthmatic; and the 2-year-old has bronchitis. Mrs. "X" had been on tranquilizers and was overwhelmed by the burdens of her unwanted pregnancy. (Belsky, T.3572; Pl. Exh. 1501/T. 3576-77, A.171-72.)

[58] Several witnesses spoke of situations of child abuse where their patients had unwanted children, repeating a cycle of such abuse when the patient had been abused as a child. (Belsky, T.3581-83, 3590-93; Slip op. at 219-30) Plaintiff Susan Roe, 19 years old, single and pregnant again when her child was 4 weeks old, swore in her affidavit that "I am fearful of becoming an abusive parent, like some of my friends, if a second pregnancy is forced upon me." (Susan Roe Aff. ¶ 2,3,6, A.123.)

[59] One poor woman seeking an abortion was thus described by her psychiatrist: "She was becoming very irritated every time the baby cried and she had done 'bad things' to her baby. The baby was nine months old. The bad things she did was to tie a rag around the baby's mouth when she cried to muffle the noise,

The trial court found that unwanted children born to women denied abortion suffer predictable disadvantages. Slip op. at 126. This conclusion was supported by the uncontested testimony of the medical witnesses and several controlled studies. Slip op. at 126-30. (Pl. Exhs. 161/T.3633, 163/T.3633; Belsky, A.187-90.)[60] HEW has recognized the correlation between abuse and the stress of poverty and unwanted childbearing. (Pl. Exh. 282, p. 25.)

Another familial consideration is the doctor's evaluation of the effect a severely deformed child will have on a woman and her existing family. Both the degree of risk and the nature of the defect are factors traditionally considered by doctors in advising their patients whether an abortion may be medically necessary.[61] The enormous life-long impact of having such a child on the mother and the entire family is

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which is, incidentally, very dangerous and can cause suffocation." (Belsky, T.3582, Pl. Exh. 152/T.3582, A.275.)

[60] A ten year study of 440 children born to women who had sought and were denied abortions and who had not aborted, concluded that the children born into this "potentially handicapping situation", suffer many disadvantages:

> The higher incidence of illness and hospitalization despite the same biological start in life, slightly poorer school marks and performance despite the same level of intelligence, somewhat worse integration in the peer-group—all these point to a higher-risk situation for the child and the family, as well as for society. Dytrych, *et. al.*, *Children Born to Women Denied Abortion*, 7 Family Planning Perspectives 165 (1975) (Pl. Exh. 161, p. 171/T.3633.) *See also*, Forssman, *et. al.*, *One Hundred and Twenty Children Born After Application for Therapeutic Abortion Refused*, 42 Alta Psychiatrica Scandinavia 71 (1966), Pl. Exh. 163, p. 87/T.3633; Belsky, T.3633.

[61] *See Indications for Termination of Pregnancy*, a report by the British Medical Association, Pl. Exh. 3/T. 55.

undisputed.[62] Slip op. at 162. (Belsky, A.192; Tietze, A.201-05.)

The Hyde Amendments preclude abortions that are medically necessary because of fetal abnormalities. Slip op. at 30-1, 130. The trial court found that this absolute exlusion—"no matter how grave the abnormality nor how great its threat to the stability of the existing family . . ."—was one of the many ways in which the Hyde standard is even narrower than that legally available to women under the pre-1973 criminal abortion laws.[63] Slip op. at 130, 162.

The record shows that, to a certain extent, amniocentesis can predict fetal abnormality. It is now possible to diagnose chromosomal defects in the fetus.[64]

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[62] Dr. Belsky described the intense suffering of one of her patients who was pregnant and who had two genetically defective children.

> [S]he was not schizophrenic but she was very depressed. She wanted very much to have a normal child. She described her experience with these two children. Liber syndrome is a severe disorder of the central nervous system and her babies were both blind and severely retarded, unable to recognize another human being, unable to sit up, talk or walk. One of them lived to be four and one lived to be two and a half and essentially they were vegetables. There was no meaningful existence, really, for these children or any maningful relationship with anybody else.
>
> I think the only reason they lived was because of her devoted care. They eventually died of pneumonia. . . . [S]he made the suicide attempt following the death of one of the children when her husband [and his] family blamed her for the disease and death of the child. (A.190-91.)

[63] A few states which adopted the Hyde standard explicitly added a category of state funded abortions for fetal deformities: Iowa, Maryland, and California. *See* n.14, *supra*.

[64] In 1974, 3,000 women used a test, amniocentesis, performed at 16 weeks of pregnancy, which identifies with 99.4% accuracy

(Tietze, A.205.) Scientific knowledge about damage to fetal development caused by drugs is growing. (Belsky, T.3620; Eliot, T.470.)

Even though rubella seemed not to qualify under the old New York life-saving abortion statute, doctors stretched the law to include these abortions. A woman who contracts rubella or German measles early in pregnancy faces an 80% risk that her child will be seriously defective. (Pl. Exh. 3, p. 175/T.55.) In New York City in 1964, the year of a rubella epidemic, 57% of abortions were for this reason.[65] (Pl. Exh. 10, p. 1/T.890.)

One type of abnormality which can be identified with certainty through amniocentesis is Tay Sachs disease. One out of every 15 Jews of Eastern European descent is a carrier. The children suffer and die a certain death. Dr. Tietze described the progress of this disease:

> The children are born normal. In fact it is said that they are particularly beautiful children and they seem to develop quite normally, but at six or nine months, things change . . . [at] 12 to 18 months the child is blind as well as completely

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all recognized chromosomal abnormalities. (Pl. Exh. 263, p. 147.) That test is much more common today. Slip op. at 132.

[65] The rubella experience demonstrates the arbitrary enforcement of the pre-liberalization standards. The ratio of therapeutic abortions for rubella to 1,000 live births at private service hospitals from 1960-62 was .40 while at municipal hospitals it was only .03. (Pl. Exh. 10/T.890.) In Minnesota, which had a life-saving standard similar to New York (Minn. Stat. Ann. Penal Code § 617.18), Dr. Hodgson had been prosecuted and convicted in 1970 for performing an abortion on a woman who had contracted rubella. (T.39-40.)

paralyzed, but he usually continues to live for another few years. They are all dead by five years of age and preceding that, they have to go through a period where they require the most intensive care . . . . Eventually they . . . have convulsions which may come as often as every hour. It's an enormous problem, financial and emotional, for the parents as well as . . . a most miserable way of dying for the child. (A.202-03.) Slip op. at 132-33.

e. Poverty Is an Additional Factor Which May Be Medically Significant.

Although poverty alone does not make abortion medically necessary, the trial court found that "poverty is medically significant." Slip op. at 101. Physical and mental illnesses are more common among the poor. Slip op. at 101-02. (Bingham, A.184; Belsky, A.185; Eliot, T.407; A, Tietze, T.991,999.) It has also been proven statistically that maternal mortality is much higher among the non-white population.[66] Slip op. at 103. (Def.-Int. Exh. H, p. 17/T.2227.) The trial court found:

> The pregnant woman's poverty, both as it affects her general health and denies her the means of

[66] In 1972, the rate of maternal mortality for non-whites was 490% higher than for the corresponding white population. The difference declined until 1975 when the rate for non-whites was 76% greater than for white females. In 1976, the rate rose again to 327% higher than white females. (Def.-Int. Exh. H/T.2227, A.304.) As 39% of black women rely on Medicaid for their health care needs, compared to seven percent of white women, and the abortion to live birth ratio is nearly two times higher among blacks than whites, the health of black women will be disproportionately affected by the funding restrictions. (Pl. Exh. 24 p. 213/T.1534.)

> dealing with her pregnancy and its special problems and restrictions, increases her risks of health damage, and even of mortality, from the diseases and conditions that cause complications in the pregnancies of women generally. Slip op. at 103.

Poor women also have less access to alternative treatment for high risk pregnancies. Bed rest may be impossible for poor women who cannot afford either to leave their jobs or to pay for help with their chores or children. (Romney, T.3966; Pisani, T.2214-15.) *See* Facts, *infra* § 8.

f. Teenage Pregnancy and Childbearing Pose Significant Risks.

The trial court found that:

> Pregnant teenagers, particularly the younger teenagers, are a disadvantaged class, recognized by Congress; they are disadvantaged by the convergence in their unwanted pregnancies of physical and psychological immaturity, poverty and dependence, and a high risk of serious pregnancy-connected physical and psychological complications that threaten permanently to undermine the health of the pregnant teenagers and their fetuses. . . .No legislative interest outweighing the interest in the teenagers' health can be advanced to justify the discriminatory denial of necessary medical care. Slip op. at 315-16.

All of the problems created when a poor woman is denied Medicaid funding for abortion are magnified for poor pregnant teenagers, who accounted for one-third of Medicaid abortions before the Hyde Amendment took effect. (Hofman, T.1332; Pl. Exh. 21/R.110.) In

1976, the HEW Office of Child Health Affairs concluded that teenage pregnancy is "one of the most if not the most pressing health problem of individuals 19 years of age and under." A 1978 HEW Task Force report found it to be a "major public health problem with serious medical health, education, social, psychological and vocational implications for the mother and baby." [67] Slip op. at 134. (Pl. Exh. 253, p. 1.)

According to a study prepared by HEW in 1977 (the "Shuck Memorandum"), approximately 300,000 adolescents receive abortions annually—one half under the age of 17. Approximately 85,000 of these teenage abortions were funded by Medicaid. Slip op. at 135-36. (Pl. Exh. 244, p. 1.)

A recent comprehensive study of adolescent health found the consensus of medical experts to be that: "Girls are at increased risk biologically and emotionally if pregnancy occurs before they complete their own physical growth." Slip op. at 134-35. (Pl. Exh. 20, p. 17/T.1317; Hoffmann, T.1368.) Dr. Hofmann, the former President of the Society for Adolescent Medicine, testified that she would consider pregnancy "a pathological condition—in a broad definition of the word pathological . . . (physiologically) for the young group and emotionally for the total adolescent group." (T.1435-36.) Slip op. at 141-42.

[67] Teenage pregnancies now account for a larger proportion of all births in the U.S. than ever before. Menken, "The Health and Demographic Consequences of Adolescent Pregnancy and Childbearing," 1977, (hereafter "Menken, 1977"), (Pl. Exh. 241, p. 1.) Although overall birth rates have declined, teenage birth rates have risen. Birth rates of girls 17 and under have risen particularly sharply. Between 1968 and 1973, the number of such births rose 25%. In contrast, during the same period total births *decreased* 10%. *Id.*

Fatal complications in pregnancy are 60% more likely for a girl under 15 than for a woman 20-24, and 13% more likely between the ages of 15 and 19. Slip op. at 137. (Pl. Exh. 21, p. 23/R.110; Hofmann, T.1346a.) Compared to women 20-24 years old, 15-19 year-olds can be twice as likely to suffer fatal complications as a result of hemorrhage, spontaneous abortion or toxemia. Under 15 they are 3.5 times more likely to die from toxemia. Slip op. at 137. (Pl. Exh. 21, p. 62/R.110; Hofmann, T.1346-48.)

The risks of severe but non-fatal complications of pregnancy, many of which permanently impair the young woman's future life, health, and reproductive capacity, are also significantly higher for teenagers.[68] HEW reports that "studies show pregnant adolescents have higher rates of toxemia, prolonged labor, premature delivery, pelvic disproportion, and Caesarean section than more mature women. Slip op. at 135. (Pl. Exh. 20, p. 17/T.1317; Hofmann, T.1345.)

The increased health risk to the adolescent can be partially attributed to her lack of physical maturation. Slip op. at 141-42. (Hofmann, A.210-11.) Dr. Hofmann testified that pregnancy during the critical growth period of puberty can actually impede physical growth, even if there are no complications. Slip op. at 144, 147. (Hofmann, A.211.)

Teenagers are further at risk in pregnancy due to their special vulnerability to specific health hazards.

[68] The increase in complications is enormous. For every 100 women between 20-25 who suffer toxemia or toxic anemia, 131 teenage girls will be afflicted by toxemia, 125 teenage girls will suffer from anemia for every 100 of the older group; and 113 teenagers will develop infections at the time of delivery for every 100 of the older group. (Pl. Exh. 21, A.260; Hofmann, T.1344.)

The Schuck Report summarizes some of those health problems to which teenagers are particularly sensitive:

> While adolescents are often characterized as a healthy group, they experience problems such as venereal disease, drug and alcohol abuse which threaten their well-being. The incidence of gonorrhea in adolescents at 15-19 is second only to those 20-24. In one national sample, 13.7 percent of adolescents reported that they were moderate to heavy drinkers—the same percentage as adults. (Pl. Exh. 244, p. 3.) *See also* slip op. at 138.

For poor pregnant teenagers, like their older counterparts, the jeopardy is even greater because poverty breeds poor health. *See infra* Section 5e. Moreover, health care services are not generally available to adolescents.[69] The trial court found, based on expert testimony and HEW documents that even the best prenatal care "has not been able to reduce adverse consequences of pregnancy to the same level as for older women . . . " (Pl. Exh. 244, p.4.)

The impact of pregnancy on adolescents is further compounded by the high incidence of rapid repeat pregnancies—about 44% of adolescents having first babies will have second pregnancies within a year.[70] Slip

[69] Teenagers are often unaware of their pregnancy because their menstrual cycle is irregular and they do not seek medical care until gestation is advanced. Slip op. at 142. (Hodgson, T.489-90; Romney, T.1140.) Fifty percent of adolescents receive no prenatal care in their first trimester; 10% do not receive any prenatal care before the third trimester. Slip op. at 142. Even those who do see physicians early in pregnancy find it difficult to comply with their doctor's suggestions regarding prenatal care. Slip op. at 143. (Hofmann, T.1343-44.)

[70] Plaintiff Mary Doe is 19 years old, and the mother of four children. She bore her first child at 14. (Doe Aff.,¶ 3, A.105.) The

op. at 136. Children born of adolescent mothers have a higher rate of infant mortality.[71] Furthermore, the trial court found that "children born of adolescent mothers are more likely to be premature and susceptible to birth defects, including mental retardation."[72] Slip op. at 162-63.

The trial court found "that teenage pregnancy imports high psychological stress for the adolescent." Slip op. at 144. Moreover, pregnancy and the profound responsibility of parenthood before the individual's emptional and psychological maturation process is complete can retard the young adolescent's achievement of full maturity. Slip op. at 143-44. (Hofmann, A.212-13.)

Depression is one of the primary symptoms, among "a host of serious emotional problems that occur with an unwanted pregnancy." (Hofmann, A.213.) One study revealed that there is a high correlation between unwanted pregnancy and suicide attempts by teenagers actually, or believing themselves to be, pregnant. (Pl. Exh. 23, p. 136/T.1377; Hofmann, A.213-14.)

HEW Report on Teenage Pregnancy states that the adverse effects of teenage pregnancies are multiplied when the second pregnancy occurs before a woman has reached 20 years of age. (Pl. Exh. 253, p. 6.)

[71] About six percent of first babies born to girls under 15 die in their first year, a rate 2.4 times higher than babies born to women in their early 20's. Babies born to 15-year-olds are twice as likely to die than babies born to mothers aged 20-21. (Pl. Exh. 21, A.260.) High mortality rate is related to prematurity, infection, and sudden infant death syndrome. (Hofmann, T.1356.)

[72] Low birth weight, a measure of prematurity, occurs with much greater frequency in infants of teenage mothers. Dr. Hofmann described it as the "single greatest risk to the fetus." (T.1351.) Prematurity is linked not only to high infant mortality but to neurological problems like epilepsy, brain damage, cerebral palsy, and mental retardation. Slip op. at 139-40.

For teenagers with pre-existing psychiatric illness such as 15-year-old plaintiff Ann Moe, unwanted pregnancy may lead to psychosis and, in addition, may preclude complete recovery forever. (Hodgson, Aff. 1/4/78, R.99, ¶ 1,7,8.)

For other teenagers, like plaintiffs Mary Doe and Susan Roe, an unwanted pregnancy, if not terminated, may be the factor which transforms a precarious and difficult life into one with which they are unable to cope either physically or mentally.[73] (Doe Aff., A.105-06; Roe Aff., A.123-24.)

6. The Hyde Amendment Is Impossible for Physicians to Apply, and Precludes the Exercise of Medical Judgment.

Both the original Hyde Amendment and the one in effect when the district court rules both required physicians to determine that the life of the pregnant woman "would be endangered if the fetus were carried to term." The trial court, concluded:

> The medical testimony requires the finding of fact that the life endangerment standard . . . is not a term used in the medical profession as a standard for determining medical procedures, and that it is not susceptible of any agreed definition among medical practitioners. Slip op. at 91.

[73] Psychological problems are aggravated by the social and educational effects of teenage pregnancies:

> Surveys indicate that between one-third and one-half of all adolescent females who drop out of school do so because of pregnancy or marriage. Early parenthood is a major reason for males to drop out of school.
>
> Adolescent parents run higher risks of unemployment and welfare dependence than those who delay their first child until their twenties. (Pl. Exh. 244, pp. 1-2.)

The court further found that:

> Restricting abortion alone of all medical procedures, to the life endangerment circumstance has no support in any medical evaluation of medical conditions and the medical procedures appropriate to the medical conditions; the physicians who reject all direct abortion do so on grounds other than a medical evaluation of condition and procedure. Slip op. at 320-21. *See also*, slip op. at 310.

Medical witnesses testified that this standard is both alien to the practice of medicine today[74] (slip op. at 91; Tietze, T.922; Hodgson, A.195-96; Romney, T.1063), and impossible to apply in the context of pregnancy. (Romney, A.217; Eliot, A.164; Hofmann, A.206-07.) They agreed that, with advanced technology and supervision, it is possible for women with life threatening conditions to survive pregnancy.[75] Slip op. at 90. However, ". . . the testimony rested on the assumption that the pregnant woman was desirous of bearing the child and was cooperative throughout the pregnancy." Slip op. at 91.

[74] The trial court found that the additional standard in the 1978 and 1979 Hyde Amendments "severe and long lasting physical health damage" adds no "added class of definable instances" (slip op. at 100), and it was not terminology familiar to the medical profession, as proven by the extreme "anomalies in classification shown by the statistics" (slip op. at 101), and despite the fact that Congress intended to add a definable class. Annex to slip op. at 236-37.

[75] Medical experts estimated that fewer than one-tenth of one percent to one percent of women who wanted to have a child, and were willing and able to follow any regime, would have to have abortions. (Bingham, A.184.)

The medical witnesses emphasized that the prognosis of any particular pregnancy is complex in light of the numerous dimensions to the life endangerment concept (slip op. at 91), including: the degree of risk to the woman's life; the probability of its eventuation; the relationship of a patient's condition to the available resources; and the patient's behavior in terms of her having the means and will to carry out the medical program. Slip op. at 92.

They testified that, despite the potential scope of "life-endangerment" there would be a reluctance to certify under such an alien standard. In fact, the trial court found that the "life-endangerment" exception has been interpreted more narrowly than the pre-1973 standards. Slip op. at 96.

a. It is Not Possible to Know Early in Pregnancy Whether a Woman's Life Will Be Endangered.

As noted, the Hyde Amendment precludes physicians from exercising medical judgment to certify abortions under Medicaid for physical, mental health or familial reasons. Although Hyde permits funding for terminating pregnancies that endanger the life of the woman, even that standard precludes the exercise of medical judgment in practice, because it requires virtual certainty. Although doctors can often determine early in pregnancy that continuation of the pregnancy will substantially increase the *risk* of life endangerment they cannot ordinarily certify that pregnancy will in fact endanger life until late in pregnancy, when it is too late to avoid or control the life-endangering complications, or when abortion itself would be very dangerous. In effect, Hyde precludes preventive medical practice, even when medically necessary, and requires

the woman and the physician to wait until there is no room left for medical judgment.

The trial court found that:

> There is a very large number of specifically pathological conditions that at some level of intensity and under some circumstances of treatment will jeopardize the health or life of a pregnant woman and indicate termination of the pregnancy as the medically most appropriate procedure. However, except for a few classic conditions, they are not characterized by that certainty of predictability that the Hyde-Conte amendment and its successors appear to require; in large part the conditions do not assume their definitely life-threatening or health destructive intensity until so late in pregnancy that abortion is no longer a safe procedure. Slip op. at 161.

No medical expert thought it possible to predict life-endangerment with certainty early in pregnancy. Dr. Romney testified that, despite the greater diagnostic tools and statistical evidence to draw upon, early prediction is very shaky in individual cases.[76] (A.216-17.) *See also*, Pisani, T.2206-09; Hofmann, T.1400, 1433.

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[76] *See* Cates, *et al.*, *The Intrauterine Device and Deaths from Spontaneous Abortion*, New Eng. J. Pub. Med. 1155 (1976), reprinted by CDC, PHS, DHEW. (Pl. Exh. 213.) Doctors also questioned certifying, for example, patients with hypertension in stressful unwanted pregnancies who run a seven-fold risk of developing, late in pregnancy and despite treatment, pre-eclamptic toxemia, a leading cause of maternal deaths. (Sloan, A.173-74; Romney, T.3968-69.) On cross-examination of Dr. Hodgson, the United States Attorney suggested that she would have to monitor such a patient until she could say "she had a real chance of a fatal stroke or some other fatal condition." (T.70.)

Maternal mortality studies are important for two reasons.[77] First, they demonstrate that the leading causes of maternal deaths are conditions for which medical science cannot make the individual predictive judgments required by the Hyde Amendments. They also underscore the importance of legal abortions in reducing maternal mortality.[78] What they do not show are those deaths from pregnancy-related suicides and those deaths caused some time after childbirth by conditions aggravated by pregnancy and childbearing.

The studies show that throughout the 1960's and 1970's, the vast majority of maternal deaths were due to direct obstetric complications of pregnancy[79] as opposed to pre-existing diseases, aggravated by pregnancy or causes unrelated to pregnancy. (Def.-Int. Exh. M, p. 2; Def. Exh. J, p. 822/T.2227.) Hypertensive states of pregnancy—a leading cause of maternal mortality, and other conditions, do not arise until late in pregnancy.[80] The studies confirm the testimony of both parties' medical experts that it is impossible to make a definitive prediction early in pregnancy that a woman will or will not die from conditions which are the leading causes of pregnancy-related deaths.[81]

[77] These include: N.Y. Department of Health, *N.Y. State Maternal Mortality Study, 1970-76,* June 1977 (Def.-Int. Exh. H/T. 2227); Schaffner *et al., Maternal Mortality in Michigan: An Epidemiologic Analysis, 1950-75,* 67 A.J. Pub. Health 821 (1977) (Def.-Int. Exh. J/T.2227); *Minnesota Maternal Mortality Study, 1950-75* (Def. Exh. M); Data on Maternal Death, *Vital Statistics of the United States* (Pl. Exh. 261).

[78] Maternal mortality studies normally include deaths arising from abortion. In 1967, the total number of maternal deaths in the United States was 218. They declined to 157 in 1968, 154 in 1969, and 128 in 1970. In 1973, the year abortion became widely legalized, maternal deaths markedly decreased to 30. There were 24 in 1974, and 17 in 1975. The major factor in the reduction of deaths was the advent of legal abortions. Slip op. at 11. (Pl. Exh. 8A, p. 15.)

[79] "Direct maternal deaths" is the term used to describe obstetric complications of the pregnancy state or labor. "Indirect maternal death" occurs when pregnancy or labor is made fatal by an underlying condition such as diabetes *See* Def.-Int. Exh. H, p. 6, A.304; Def.-Int. Exh. J, p. 822/T.2227.

Predictability in the "large gray area" of borderline cases described by Dr. Romney and others, is virtually impossible. He described the unpredictability surrounding women "who are not totally healthy . . ., who have [an] acute or chronic disease" which is not of sufficient magnitude to clearly predict trouble. (T.1118-19.) Discussing the impossibility of predicting life-endangerment in the hypothetical case of a markedly obese woman seeking an early abortion, he said:

> I had no crystal ball which allowed me specifically to project the course . . . [the] pregnancy would

[80] A New York study of maternal deaths from 1970-76 shows that in each hypertensive state case, the condition did not appear until after the 20th week of gestation with the eclamptogenic process usually appearing later than the 25th week. A study of complete case records showed that even after death it was not possible to identify any prior medical history connected with the deaths of eight of the eleven women studied. (Def.-Int. Exh. H, p. 28/T.2227, A.306.) Defendant's expert Dr. Pisani stated that death from pulmonary embolism was not generally predictable in advance (T.2207) and is more likely to occur in a pregnancy carried to term than during a first trimester abortion (T.2208). He also testified that amniotic fluid embolism, another leading cause of death, does not occur in the first trimester and cannot be prediagnosed as it is ascertained only by autopsy. (T.2208-09.)

[81] The medical conditions which were certified under a "preserve life" standard in New York prior to 1970 were those pre-existing conditions, such as rheumatic heart disease, tumors, etc., that are classified as "indirect" causes of maternal deaths. (Pl. Exh. 10 Table 4/T.890, slip op. at 13-4.)

follow for any particular woman who was that markedly obese [and] at the time I saw her [said], "Doctor, under no conditions do I want to continue this pregnancy." That would create a problem for me because I couldn't look down the road and know whether she might develop ancillary complications that might threaten her.[82] (T.1214.)

Medical science can identify certain groups of women who run a substantially heightened risk of death from pregnancy and labor. Women under great stress and tension are more likely to die from hypertensive states of pregnancy than those who are not.[83] (Sloan, T.1641-51.) Black women who run disproportionate risks of mortality and morbidity in pregnancy suffer more frequently from hypertension. (Pisani, T.2212.)

Teenagers and older women also face substantially higher risks of maternal death than their 20-24 year-old counterparts. Slip op. at 137, 150.

The predictability of danger increases as pregnancy progresses, but, by the time a doctor can certify with

[82] Similarly, it is impossible to predict which individual with an IUD in place would be killed by infection later in pregnancy (Hodgson, A.197); likewise with the woman suffering from anemia (Romney, T.1160), severe varicose veins (Romney, T.1119, 3935-36), or cystitis which could cause a renal abscess late in pregnancy (Romney, T.1120).

[83] The availability of legal abortion not only virtually eliminates abortion-related mortality resulting principally from the complications of illegal and self-induced abortion, *see* n. 78, *supra*, but also accounts for a decrease in mortality among women who have a high risk of encountering serious problems by permitting them safely to discontinue an unwanted pregnancy they would otherwise have carried to term. Complications arising out of or exacerbated by the stress of unwanted pregnancy are reduced.

some certainty that a woman might die, it will probably be too late to save her by any medical intervention.[84]

b. The Hyde Amendment Standard Is Alien to Good Medical Practice and Has Inhibited Doctors' Treatment of Medicaid-Eligible Women.

The trial court found that:

> The evidence requires the conclusion that the medical profession will interpret and has interpreted the Hyde-Conte Amendment and its successors narrowly rather than attempt to demonstrate to DHEW the basis of their medical judgments in cases in which they are satisfied that abortions are medically necessary for the pregnant woman's health but in which they can have no confidence that they could produce clinical data demonstrating to the satisfaction of DHEW that certainty of life endangerment or of severe and long-lasting physical health damage that the enactments appear to require. Slip op. at 159-60.

To enhance predictability by waiting to see how pregnancy progresses was inimical to plaintiffs' witnesses' principles of good and appropriate medical care. (Romney, T. 1067-77; Rothschild, T.690-91.) Yet this is what the Hyde standard requires.

[84] The New York Study (Def-Int. Exh. H, p. 30/T.2227) reveals that emergency abortions had been performed for all 13 women who died from preeclampsia. The testimony confirmed that a woman can die of toxemia even with the best medical care. (Hofmann, T.1433.) Similarly, a late abortion does not resolve the danger created by pulmonary or amniotic fluid embolism. Nor can a late abortion or treatment counteract the rapid infection resulting from an IUD *in situ* (Hodgson, A.197).

The trial court found:

> The supporting data for safe certification cannot be at hand at the time when professional judgment would approve a termination of the pregnancy as "medically necessary," as that term is understood in the medical profession. The effect tends to be to relegate abortion to the status of a crisis intervention procedure. Slip op. at 110.

The statistics confirm that Medicaid abortions under the Hyde standard have been limited to crisis situations. Slip op. at 158-59. Behind those statistics lie the real problems of plaintiff class members for whom the denial of abortions may result not only in increased risks, but, in some cases, permanent health damage.[85] Serious complications arise from delay because it both increases the risk of the abortion itself and exacerbates the risks of the underlying condition. Slip op. at 113-14, 161.

The trial court found that the inhibiting effect of the Hyde Amendment resulted in

> . . . the very substantial risk that professional reluctance to certify under a standard alien to medical experience and terminology would deny medical assistance to women in instances in which

[85] A Texas Medicaid-eligible teenager was turned down by the state for an abortion because she had not reached the crisis point. This 15-year-old girl with chronic glomerulonephritis applied for prior approval pursuant to state law through her doctor, Dudley Powell. Two doctors agreed that this condition, a kidney disease, made her pregnancy life-threatening. Their request was denied, evidently because chronic glomerulonephritis was not considered a condition which would "endanger the mother's life if the fetus were carried to term." (Pl. Exh. 455A-D, A.300-303.)

> it would not have been withheld under the older abortion committee standards. Slip op. at 99-100.

Therapeutic abortion certifications under state laws before 1973, such as the "preserve life" standard in New York, were found relevant by the trial court for two reasons. First, testimony and studies on those certifications show that they were made arbitrarily, depending on the status of the doctor and the wealth of the patient, not on an expected difference based on individual doctors' medical judgments.[86] (Tietze, T.899, 917; Romney, A.217; Pl. Exh. 10/Table 2/T.890.) Some hospitals even had abortion quotas, irrespective of need. (Tietze, T.938.)

Second, the trial court found that the Hyde standards signaled a return to a practice even narrower than these arbitrary standards. Slip op. at 159.

Medical testimony was in agreement on the inhibiting effect of the Hyde standards on doctors, standards requiring doctors to single out abortion and treat their poor pregnant patients differently than any other Medicaid or private patient. (Romney, T.1155-66; Eliot, A.164.)

[86] Even in the same hospital, private patients were about four times as likely to get certified for medical non-psychiatric conditions than the poor. In 1964, at University Hospital, there were 14 times more certifications for rubella than at Bellevue, the public part of the hospital, yet admittedly the poor suffer more from the certifiable conditions. (Belsky, T.3523.) *See* slip op. at 13.

7. The "Medically Necessary" Standard Is Understood by the Medical Profession.

The trial court found that:

> The medical evidence made it abundantly clear that the medical profession does not treat pregnancy, the threat of complications in pregnancy, and the factor of the pregnant woman's attitude toward her pregnancy and child bearing in terms related to determining whether the "life of the mother would be endangered if the fetus were carried to term." Slip op. at 95.

The witnesses agreed, and the trial court found, that a "medically necessary" standard did allow doctors the scope to exercise their best medical judgment. Slip op. at 88-89. (Rothschild, A.148, T.709-10; Romney, A.215-16; Eliot, A.161; Belsky, T.3570.) The evidence shows that the medical necessity standard approved in *Doe v. Bolton* and *Beal v. Doe* is in fact the standard applied by the medical profession to their general practice and to pregnancy in particular. Slip op. at 88-89, 101. (Belsky, T.3570; Rothschild, T.709-10.) The *Doe v. Bolton* formulation of the medical necessity standard promotes the exercise of good medical judgment in three crucial ways: (1) it permits a comprehensive evaluation of all factors affecting health; (2) it embodies the essential principles of preventive medicine;[87] and

[87] A witness used the example of a teenager with strep throat. Penicillin would cure it but it is also probable that it would get better without treatment. If penicillin is not given, there is a risk of rheumatic fever. This, too, could be self-correcting, or it could produce heart damage that would shorten life by 20 years. (Hofmann, A.207-08.)

(3) it allows flexibility in weighing the risks and benefits of medical intervention.[88]

8. There Are No Alternatives For Poor Women Who Need Medically Necessary Abortions.

Poor women seeking to avoid health threatening pregnancies cannot depend on contraception. Those methods most effective in preventing pregnancy present the greatest danger to health.[89] Without abortion as a back-up for contraceptive failure, poor women will be pressured into foregoing safety for effectiveness[90] or submitting to irreversible sterilization, which

[88] The trial court found that even those doctors who testified for the intervenor, who oppose abortion on principle, do not disagree "that from a therapeutic viewpoint abortion would be medically necessary to preserve the pregnant woman's health in significant classes of cases falling outside the classes delineated in the successive Hyde Amendments." Slip op. at 310.

[89] A leading study shows that people who use various methods of contraception run the following risks of unintended pregnancy during the first year: oral contraceptives, 6%; IUD, 12%; condom, 18%; diaphragm, 23%; foam, 31%; rhythmn, 33%. *See* Pl. Exh. 27/T.1567, A.266. However, the two most effective methods are also the most dangerous, with mortality from the pill being 58.4 deaths per 100,000 pill users aged 40-44 who smoke. The IUD mortality rate is about 1 per 100,000 users, a rate that is biased downward since it is estimated that most unwanted pregnancies with an IUD *in utero* were terminated by legal abortion in the first trimester. *See* Pl. Exh. 16, Table 1/T.970-71.

[90] Dr. Hodgson testified about a mother of three who had cancer with a prognosis of five years to live. She became pregnant using a diaphragm and could not use the pill since it could accelerate the cancer. (T.37.) Women who are smokers, obese, or who have high blood pressure are also warned against the pill. On the basis of all the data, Dr. Tietze concluded that in terms of risk of life the safest procedures for regulating fertility were use of the diaphragm and condom, which are "perfectly safe, although not 100% effective—and the termination of pregnancies resulting from contraception failure. . . ." (Tietze, T.971; Pl. Exh. 16, p. 3/T.970-71.)

they may not freely choose, but which is federally funded.[91] (Sloan, T.1675-76.)

Medicaid women who need medically necessary abortions have few options. A few may qualify for Medicaid abortions under the life-endangering standard, but not until it is "crisis intervention." Slip op. at 159, 110. The trial court found that the delay inherent in a doctor marshalling evidence and monitoring pregnancy until the woman's life is "endangered" would increase serious complications.[92] Slip op. at 97. (Romney, A.218.)

Women denied Medicaid abortions are left few choices. They may undergo a great sacrifice to pay for a legal abortion and suffer the increased risk of the delay in raising funds. They may jeopardize their lives by self-abortion or illegal abortion. Or they may unwillingly continue an abnormal pregnancy which, as it

[91] The Department of HEW has recently issued new regulations to prevent situations of sterilization abuse on Medicaid women. 45 C.F.R. 205.35. Before 1973, approval by hospital abortion committees was often conditioned on the woman's agreement to have a concurrent sterilization operation. (Pl. Exh. 289, p. 93; Eliot, T.476.) *See* also Brief of *Amici Curiae* National Lawyers Guild, *et al.*

[92] This finding by the trial court was supported not only by expert testimony but by Dr. Tietze's description of the experience in Sweden, where in 1938 the law allowed abortion only where it was necessary to avert a serious threat to the woman's life or health due to disease, physical impairment or weakness. (Pl. Exh. 8, p. 55/T.885.) Swedish doctors interpreted the law as requiring that they monitor patients to see whether problems in fact developed. (T.1009.) The result was that by 1968, 57% of the abortions in Sweden were done in the second trimester, and the mortality for legal abortion was greater than the mortality for childbirth. The law was then changed. Subsequently, 90% of abortions were done in the first trimester with a dramatic morbidity and mortality reduction. (T.1010.)

progresses, increases the risks to their life and health. Each of these options increases the risks to the lives and health of women denied medically necessary abortions.

The chair of an HEW Task Force directed to find alternatives to abortion concluded:

> [Abortion] is an option, uniquely, which is exercised between conception and live birth. As such, the literal alternatives to it are suicide, motherhood, and, some would add, madness. (Pl. Exh. 248, A.299.)

The trial court concluded that "[i]ndigent women, dependent on public assistance provided through AFDC programs are dependent on Medicaid. . .for legal abortions." Slip op. at 75. Even in states where the welfare allotment is above the national average, welfare recipients "must live at a miserable and humiliating level of bare subsistence." Slip op. at 76-77. (Dweck, T.1791-93.) The cost of a safe, legal abortion is beyond the means of most poor women. In 1976, the average cost of an abortion ($280) exceeded the average *monthly* AFDC payment for a *family of four* ($238) by $42. (Pl. Exh. 24/T.1534; A.264.) The average cost of an abortion to a Medicaid woman is even greater since Medicaid women are three times more likely to rely on hospitals for their general medical care (slip op. at 76), and women seeking medically necessary abortions, particularly teenagers, are more likely to require a more costly second trimester abortion.[93] Slip op. at 76. (Romney, A.221-22.)

[93] The cost of second trimester abortions performed in hospitals ranges from $350 to $1,000 or more, thus foreclosing the possibility for such abortions for most poor women. (Kissling, T.1453.)

Even a doctor who will perform an abortion without charge is often limited by the hospital's refusal to admit a patient without prepayment or a prior guarantee of payment, as with cases of plaintiffs Ann Moe and Mary Doe. (Bingham, A.183; Hodgson, A.196.)

An indigent woman cannot depend on philanthropic or charitable institutions to assist her in obtaining an abortion. The district court specifically found that abortions are not generally available at free public hospitals or through philanthropic assistance, or at reduced clinical charges. Slip op. at 74-75. Although providers do perform some free or reduced fee services, they can do so for only a very few Medicaid recipients denied medically necessary abortions. Slip op. at 77-78. (Kissling, T.1482.)

Faced with the utter inaccessibility of legal abortion, a woman may use her family's meager stipend to obtain an abortion, or try to raise the money herself. *See* n. 35, *supra*.

Women whose lives and health are most endangered by unwanted pregnancies are least likely to be able to raise private funds or to ferret out the scarce charitable resources to fund a legal abortion. Teenagers are financially dependent on their families, whom they often cannot tell about their pregnancy, and they are not likely to have outside sources of income. Fifteen-year-old plaintiff Ann Moe, with a history of mental instability, institutionalized for most of the three years prior to her pregnancy, would hardly be capable of aggressively searching out alternatives to fund a legal abortion. A young girl already traumatized by rape or incest, or in fact a woman of any age with serious mental problems, would hardly be expected to deal

with the additional pressure of raising funds for a legal abortion.

Failing to obtain the money to finance a legal abortion, women may be forced to undergo self-abortion or non-legal abortion. Women obtaining illegal abortions today are exposed to higher risks than women who obtained them in the 1960's. (Tietze, A.198.) (*See* Section C-3, *supra*.)

Women denied medically necessary abortions are likely to be at an advanced stage of pregnancy by the time they try to self-abort or seek out a non-legal abortion, and thus face even greater risks than at earlier stages. *See* slip op. at 104-10; and Section C-3, *supra*.

Adoption is at best a desperate alternative of last resort. Even in a normal pregnancy it is a painful and often unavailable option to poor women.[94] Katherine Krauser, an AFDC mother of five, testified that despite her decision to give up her baby for adoption at birth, Ms. Krauser could not relinquish the infant when a woman arrived at her home four months later to claim "baby Krauser." (A.178.) Although she had had three unwanted pregnancies, she felt that giving up her children for adoption was an unacceptable option: it would be "like selling them on the slave market." (T.1761.)

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[94] The children of Medicaid women are not the most likely to be adopted. They are likely to be bounced "from foster home to foster home, and from institution to institution." Hofmann, T.1386. HEW reports indicate that as many as 350,000 children are in foster care, including 90,000-120,000 with special needs. (Pl. Exh. 287, p. 1.)

Dr. Judith Belsky gave testimony concerning patients who had both had an abortion and given up a baby for adoption. "They said giving up the baby for adoption was much worse. Whatever guilt . . . they had about the abortion they got over, but that they never could get over the sense of loss of the child they had given away. . . ." (A.192-93.) For women who know their child will be deformed or genetically impaired, adoption is not an option. Nor is it an option for teenagers at great physical and emotional risk in pregnancy, whose children are more likely to be born with physical and mental defects. Slip op. at 139-40. In fact, the Schuck Report indicates that 85% of teenage mothers keep their children. (Pl. Exh. 244, p. 3.)

The absence of government funding for medically necessary abortions for many women does not lead to normal childbirth but to physical and mental suffering, or possibly death. They may bear severely defective children doomed to lead short and painful lives, or to live their lives in institutions or as agonizing burdens to their parents and existing families. Surely this suffering of poor women and their children cannot be said to encourage normal childbirth.

9. Abortion is a Matter of Religious and Conscientious Belief as to Which Regligions Are Deeply and Irreconcilably Divided.

The explanation for the terrible toll on poor women's health exacted by the Hyde Amendments can be found in neither medical, fiscal nor demographic considerations; rather the Hyde Amendments reflect the fundamental religious division in our society over the morality of abortion and the proper role of civil law in the

face of religious dispute on a matter of private conscientious decision.

At the heart of the abortion controversy is a confrontation over religious faith and moral conviction on a matter of ultimate concern. As the district court found, "the issue is one involving moral principle and resting on religious teaching." Slip op. at 238. The differing beliefs, grounded in Scripture and moral reasoning, are "identifiably religious and constitute an integral element of denominational religious difference." Slip op. at 238.

The differences turn not on science or medical fact, but on "considerations of divine purpose . . ., the divine relation to the creation of life," (slip op. at 239) and of the role of the individual in shaping the divine plan and determining the fundamental question of human existence and human fulfillment.

Those who adhere to the anti-abortion view share the Creationist perspective, viewing the fetus as created by God at the "moment" of conception and confering ultimate value on the fertilized egg. By contrast, the pro-choice view holds that, though life is a gift of God, the decision whether to bring a life into the world is confided to the conscience of the pregnant woman. She decides according to her interpretation of God's purposes and her ultimate moral and ethical precepts. Whether described as religious or moral, "all the views are rooted firmly in religion, in belief in God's will, in God as the author of life, and in God's concern with humankind." Slip op. at 239.

The two views lead to diametrically opposed approaches to the role of law. The Creationists oppose legal abortion because it transgresses natural law,

divine in origin. They would have civil law impose this view on all women. The pro-choice view rejects as intolerable a rule of law that conflicts with or intrudes upon "the rule of conduct that moral theology explicates." Slip op. at 240. They insist that civil law leave to women the decision to choose or never to consider abortion, in accordance with their individual consciences and religious beliefs.

The differences among the denominations demonstrate: (1) that the abortion question is one upon which religions are irreconcilably divided; and (2) that the decision or non-decision in respect to abortion is one which, by its nature, inheres in the realm of the free exercise of religion and conscience.

a. Theological Positions Opposed to Abortion

i. The Roman Catholic Doctrine

The largest, most powerful and active denomination condemning abortion is the Roman Catholic Church. Abortion is a grave sin punished by automatic excommunication. (Smith, T.2117-2118.) The Declaration on Abortion issued in 1974 by the Sacred Congregation for the Doctrine of the Faith, is the Church's most definitive and authoritative statement on the morality of abortion. Slip op. at 169. (Def.-Int. Exh. E/T.2100-2102.)

Citing Scripture, Church teachings and moral reason, the Declaration grounds the impermissibility of abortion on the belief that human life begins with fertilization. (*Id.* pp. 2-3.)[95] The humanity and inviola-

[95] The term "human life" is used here, as it is in doctrine, as indicating equivalence to a born human being. Intervenors' witness Father William B. Smith testified that the fetus is "human life with potential, but if potential as against actual, it is an actual human life. If it is potential, it is not actual." (Smith, T.2128.)

bility of the fertilized egg is based neither on science nor on a certainty that the soul is infused at the first moment, but on theological doubt as to animation. It is a matter of " 'moral affirmation' . . . independent of the philosophical problem" of ensoulment. Slip op. at 171.

The scientific discovery that the genetic code is established at fertilization merely confirms the Church's teaching:

> [I]t is not up to biological sciences to make a definitive judgment on questions which are properly philosophical and moral, such as the moment when a human person is constituted or the legitimacy of abortion. From a moral point of view this is certain: even if a doubt existed concerning whether the fruit of conception is already a human person, it is objectively a grave sin to dare to risk murder. "The one who will be a man is already one." (Def.-Int. Exh. E, p. 6/T.2100-2102.)

As the district court explained: "[r]ational analysis and biological learning may, in the teaching of the Declaration, suffice to impose the same obligation to respect human life, but the obligation is seen nonetheless as religiously imposed." Slip op. at 228.

"Roman Catholic doctrine puts on the embryo and fetus a value equivalent to that placed on the life of born human beings, ignoring its futurity as irrelevant to a value analysis determined by considerations of divine purpose and of the divine relation to the crea-

tion of life." Slip op. at 239. The Declaration recognizes no justification for abortion—not even the life of the pregnant women. Slip op. at 169. (Def.-Int. Exh. E, p.6/T.2100.)

Catholic teaching distinguishes "indirect" abortion, i.e., "operations, treatments and medications which do not directly intend termination of pregnancy, but which have as their purpose the cure of a proportionately serious pathological condition of the mother . . . when they cannot be safely postponed until the fetus is viable . . . ." Slip op. at 171-72. The double effect principle does not justify abortion to save the woman's life but does encompass a number of life-threatening circumstances (*see* slip op. at 172-73), as well as removal of an ectopic pregnancy. Doctrine also permits immediate treatment of rape and incest victims so long as the treatment occurs to prevent conception. Slip op. at 173.

Roman Catholic doctors and nurses may not participate in abortions and to be compelled to do so would be a violation of conscience. Slip op. at 174. (Smith, T.2129-30.) Father Smith testified that a Medicaid program which reversed the terms of the Hyde Amendments, excluding childbirth services while funding abortion, would impede a poor Catholic woman's free exercise of religion. (Smith, T.2131-36, A.231-33.)[96]

[96] The Pastoral Letter "Human Life in Our Day", issued by the National Conference of Catholic Bishops in 1968, likewise insisted, with respect to family planning programs, that society should "never dictate, directly or indirectly, recourse to the prevention of life or to its destruction in any of its phases." Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 93rd Cong., 2nd Sess., on S.J. Res. 119 and S.J. Res. 130, Vol. I (Abortion—Part 1) (1974) (hereinafter Abortion Hearings I), p. 318.

However, Father Smith also testified that Catholics must pay taxes, even if a portion is used for what the Church considers immoral purposes. (Smith, T.2113-14.)

ii. The Mormon Church

The Church of Jesus Christ of Latter Day Saints, the Mormon Church, views abortion as "a revolting and sinful practice," subject to disciplinary action by "church councils as the circumstances warrant." Abortion is permitted in "rare" circumstances where medical counsel confirms that "life or good health of the mother is seriously endangered or where the pregnancy was caused by rape and produces serious emotional trauma in the mother." Counseling with presiding priesthood authority for the purpose of receiving "divine confirmation through prayer" is required prior to the abortion. (Abortion Hearings I, p. 318.)

iii. The Position of the Lutheran Church—Missouri Synod

As the only Lutheran sect to oppose abortion, the Synod expounds the view, derived from Scripture, that "life comes into being by an act that shares in the creation power of God," and that nascent life—established at the blastocyst stage—derives value because it stands in eternal relationship to God. (Abortion Hearings I, p. 321.) Slip op. at 177. The woman's life takes precedence, however, over nascent life. Though broader than the Roman Catholic, this exception is regarded as "indirect abortion" because it is "a consequence of an action undertaken to preserve life." Slip op. at 177. (Abortion Hearings I, p. 321.)

iv. Orthodox Jewish Teaching

The Orthodox Jewish position views abortion as akin to homicide, but as justifiable killing in self-defense where the pregnant woman's life is threatened. Slip op. at 175. This warrant for abortion, grounded in the Talmud, embraces both physical and psychological (suicidal) threats to life, (Feldman, T.1863-4), and includes certain cases of rape. Slip op. at 176. In life-threatening circumstances abortion is mandatory until the head of the fetus emerges. Many Orthodox Jewish theologians feel, however, that at some point early in gestation ". . . the fetus is to all intents and purposes a human being insofar as questions concerning destruction of the fetus are concerned." (Abortion Hearings I, p. 316, Rabbi David Bleich.) Slip op. at 176.

b. Theological Positions Viewing the Abortion Right as a Matter of Religious Liberty

In the past two decades, many religious bodies have officially affirmed their view that the right to terminate a pregnancy is a necessary and sacred aspect of religious decisionmaking and religious practice.[97] There are three major theological approaches among the pro-choice denominations.

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[97] Among the denominational groups which have taken stands recognizing abortion as a matter of conscientious decision and religious liberty are all the eight major Baptist denominations, see § iii at n.101, *infra*, the Division of Homeland Ministries of the Christian Church (Disciples of Christ), the Board of Homeland Ministries of the United Church of Christ, the United Methodist Church, the American Ethical Union, the United Presbyterian Church in the U.S.A., the Lutheran Church in America, the American Humanist Association, the Moravian Church in America, the Church of the Brethren, the Unitarian Universalists, the Reorganized Church of the Latter Day Saints, the Reformed Church in America, the American Jewish Congress, Catholics for a Free Choice, Union of American Hebrew Congregations, United Synagogue of America, Young Women's Christian Association, Commission of Social Action of Reform Judaism, Church Women United, Women of the Episcopal Church, and the Friends Committee on National Legislation, Pl. Exh. 320/R. 233, Cong. Rec. daily ed. S.14564-65, August 26, 1979. In this case, the Women's Division of the Board of Global Ministries of the United Methodist Church intervened as plaintiffs "on behalf of itself and the membership of United Methodist women." (Hoover Aff., ¶ 1,A.129.)

i. Conservative and Reform Jewish Teaching

As explained by plaintiffs-appellees' witness, Rabbi David M. Feldman, Conservative and Reform Judaism follow the more liberal tradition in Jewish law and permit abortion where the woman's physical or mental health is threatened and may even mandate it in life-threatening situations.[98] The line between mandatory and permitted abortions is not a sharp one, however. Where abortion is permitted, it is, as "an outgrowth of the whole Jewish tradition . . . recommended," even if not strictly mandated. (Feldman, T.1930-31, 1935-36.) The governing principle is that the woman's "welfare is primary and her statement of her welfare is primary." (Feldman, T.1875-76.) Slip op. at 181. Where abortion is necessary to preserve life or health, it is a religious duty equally or even more important to the practice of the faith than the observance of ritual. Slip op. at 181. (Feldman, T.1877-80, 1916-17.)

The liberal Jewish tradition recognizes a broad range of circumstances where abortion is warranted, including the pregnancy of a very young teenager, or a pregnancy which threatens the nurture of existing

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[98] This view is embodied in the resolution of the Biennial Convention of the United Synagogue of America which reflects as well the views of the Law Committee of the Rabbinical Assembly. Slip op. at 182. (Pl. Exh. 320/R. 233.)

children, or extreme pain in childbirth. Where the woman is suffering mental anguish over the possibility of bearing a defective child, she may abort even though that possibility alone would not warrant abortion. Abortion is also permitted to prevent anguish over bearing a child out-of-wedlock. Slip op. at 179-80. (Feldman, T.1865-74.)

The primacy accorded the woman's health and welfare flows from two basic teachings: the Biblical injunction to "choose life" (T.1907), which, in most cases, places preservation of one's health above even the commands of the Torah, slip op. at 178-79 (T.1859); and the principle that the fetus is only potential life until birth. Slip op. at 181. (Feldman, T.1858.) Rabbi Feldman described this principle as "immutable" (T.1922) because "the point when biological life passes from potential human life to human life has got to be a metaphysical, religious, philosophic determination rather than a medical, biological or even a legal one." (Feldman, A.223.) Because the Hyde Amendment creates a serious obstacle to a poor Jewish woman's access to abortion, it interferes with her ability freely to exercise her religious choice. (Feldman, T.1935-36.)

ii. The Mainstream Protestant Perspective

Dean Philip J. Wogaman, a United Methodist minister and recent past president of the Society of Christian Ethicists, explained that it is generally accepted among mainstream Protestant denominations and ethicists and others that "nearly no aspect of life is more sacred, closer to being human in relation to God than bringing new life into the world to share in the gift of God's grace and God's covenant." Slip op. at 192-93. (Wogaman, T.1959.) There is a duty, founded in the Bible as interpreted through the person of Jesus Christ, to make a deliberate decision about child-bearing according to the principles of responsible parenthood. One must consider whether one "is bringing a life into the world under conditions which make it possible for that life to participate in God's intention . . . [and under conditions which will not] threaten to undermine the theologically understood fulfillment of already existing human beings." Slip op. at 193-94.

Though there are no categorical rules (Wogaman, T.1966), there are many circumstances in which it might be contrary to God's purposes to bear a child: where there is risk to the life or physical or mental health of the woman or capacity of the future child; where, as in the case of some teenagers, the new life might not receive the nurture necessary for human fulfillment; where the pregnancy is close to menopause and would adversely affect the woman or her existing family and the social situation of the child; where the pregnancy results from rape or incest; or where the socio-economic condition of the family makes it impossible to nurture the new life emotionally and spiritually as well as physically.[99]

Abortion may be "mandatory as a person's responsibility before God" (Wogaman, T.2033), and that judgment is "referred to the woman and her own religious conscience." Slip op. at 197. The decision of responsible parenthood involves a religious duty of the highest order, transcending that of ritualistic practice. (Wogaman, A.223-24.)

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[99] Slip op. at 194-95; *see also* Pl. Exh. 320/R.233; Statements of United Presbyterian Church, U.S.A.: Women's Division, Board of Global Ministries, United Methodist Church; Lutheran Church in America; and the Presbyterian Church in the United States.

Concern for the fetus is always subordinated to concern for existing human life. It is generally accepted that "human personhood in the sense in which the person receives its maximum value in relation to the Christian faith—does not exist in the earlier phases of pregnancy . . . .[T]he degree of sanctity or value ascribed to fetal life increases correspondingly to the stages of fetal development." Slip op. at 195-96. (Wogaman, T.1984.) Some Protestant theologians accept the Jewish view that personhood is not attained until birth. (Wogaman, T.2072.)

The operative consideration is not biological, however. Virtually all theologians and ethicists share the view that biology does not confer value but that "the value of the entity arises from its relation to ultimate reality" and that this "value question is one of moral judgment and ultimately religious in origin." Slip op. at 198.[100]

Dean Wogaman described the Hyde Amendment as denying or impeding the exercise of the duty of responsible parenthood. The Amendments invade the realm of free exercise because "[t]he concern here is the whole fabric or conditions of human existence" not limited simply to the case of risk to the health of the mother. (Wogaman, T.1972-73.)

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[100] Dean Wogaman's own view illustrates the relationship between science and moral judgment. For him, personhood, which does not preclude abortion but enhances its gravity, does not begin until the fetus is capable of awareness, since "the covenant relationship, . . . which defines the very essence and heart of our faith, . . . is something which occurs between God as the Creator of reality and those who have begun to experience the reality which God has created." (Wogaman, T.1985.)

Because personhood is ultimately a moral rather than a biological determination, technological viability does not determine value although today it corresponds roughly to the dawning of awareness. Thus, technological developments advancing the point of viability would not alter the duty to make a decision of responsible parenthood. (Wogaman, A.226-27.)

iii. The Baptist Perspective

Dr. James E. Wood, Executive Director of the Baptist Joint Committee on Public Affairs,[101] testified that there is no distinct Baptist discipline or norm applicable to abortion. Slip op. at 183-84. Decisions about procreation are matters of conscience because bringing a life into the world is "a moral decision [which] comes out of some sense of moral awareness [and] . . . takes on real religious meaning because it is being absolutized as an ultimate, a supreme obligation." (Wood, T.3184; A.238.) Slip op. at 184-85. Voluntarism in matters of faith or ultimate concern, i.e., liberty of conscience, is itself "the most precious single principle for the Baptist understanding of religious faith and in particular Christian faith." (Wood, T.3181-83.) Slip op. at 184.

Baptists believe that the right of individual conscientious decision on the question of abortion is universal. It is a religious matter for everyone because it involves a sense of the sacred, of ultimate concern, and moral imperatives which are, or function for the individual as, divine commands. (Wood, T.3181-85, 3212-

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[101] The Baptist Joint Committee is composed of eight bodies: the American Baptist Churches in the U.S.A.; the Baptist General Conference; the National Baptist Convention, Inc.; the National Baptist Convention of America; the North American Baptist Conference; the Progressive National Baptist Convention; the Southern Baptist Convention; and the Seventh Day Baptist General Conference. These groups have a combined membership of 30 million people. (Wood, T.3177-78.)

20, 3244-45.) Conscience dictates what value is ascribed to fetal life[102] as well as what considerations justify abortion, whether as an affirmative or reluctant moral necessity.[103]

The Baptist bodies generally view abortion as acceptable in varying degrees in situations where pregnancy is involuntary, due to not only rape and incest but extreme youth and contraceptive failure; is threatening to the mental, emotional and physical health of the woman; or unwanted for a wide range of reasons, including significant familial considerations. Slip op. at 191.[104]

Notwithstanding that various Baptist bodies hold differing views about fetal life and acceptable indications for abortion,[105] they agree that public policy must allow persons to make the abortion decision for themselves and provide access to medical services in accordance with the decision. Slip op. at 184.[106] Dr. Wood viewed the withholding of funds for abortion, in the context of a comprehensive medical service program, as a "gross entanglement of institutional government into the moral and religious values of the people of this country" (Wood, T.3278-80), and described the riders as placing a "stigma, not only on poor women, but on all citizens." (T.3222.)

[102] Dr. Wood emphasized his agreement with the principle that the attribution to the fetus of the value of human life is not a biological judgment, but rather a moral judgment. (Wood, T.3210, 3241, 3308-10.)

[103] In response to the U.S. Attorney's suggestion that some women would not take the decision seriously enough to qualify it as religious, Dr. Wood stated that "Government does not have the kind of competency to determine the depth or degree of soul searching, the extent of anguish and pain that persons experience to arrive at that point of decision-making." (Wood, A.245.)

[104] Wood, T.3237-38; Pl. Exhs. 131, 132/T.3173-74.

[105] *See* slip op. at 185-90. (Pl. Exh. 132/T.3173.) For example, the Baptist General Convention of Texas, the largest component of the Southern Baptist Convention, urged "[r]ecogni[tion] that Christian Love at times dictates an affirmative action against an attitude of 'doing nothing'" (Pl. Exh. 132/T.3173), whereas the Southern Baptist Convention has reaffirmed the Biblical sacredness and dignity of all human life "including fetal life." Slip op. at 189. Dr. Wood testified that it is absolutely incomprehensible to him to think of the fetus as human life or a person until birth. (Wood, T.3241-43.)

c. Dissent Within the Denominations

The district court properly found that there is no unanimity within any of the denominations. Slip op. at 166-67. The intra-religious differences, like the inter-religious ones, however, are theological and ultimate in dimension.

Among Baptists, for example, the organization "Baptists for Life" shares the Catholic view that from conception the fetus is an innocent, actual human being and that abortion is, therefore, tantamount to murder. (Pl. Exh. 139/T.3216, A.316.) Dr. Wood testified that all the Baptist publications and statements he had ever read opposing legal abortion articulated their opposition in very religious terms citing Scripture and religious principles.[107] (A.241-42.)

[106] The Southern Baptist Convention recently rejected one resolution describing the fetus as "an innocent human being" and another opposing permissive abortion legislation. Slip op. at 189-90. While registering its disapproval of abortion, the body reaffirmed its position on the "limited role of government in dealing with matters related to abortion." (Pl. Exh. 134 and 135/T.3193.) Dr. Wood characterized this as an affirmation of freedom of conscience, irrespective of moral condonation or condemnation of abortion. Slip op. at 188-90. (Wood, T.3201-03.)

[107] He provided several letters as examples, one which declares opposition to a constitutional amendment to be "totally contrary

The defendant-intervenors' witness, Paul Ramsey, also a United Methodist theologian, held a much stricter view on the acceptability of abortion than that explained as mainstream by Dean Wogaman. Slip op. at 198-99. (Ramsey, T.2362.) The fundamentalist Protestant or Scriptural literalist approach also generally condemns abortion.[108] (Pl. Exh. 456/R.233, A.327.)

Perhaps the greatest division exists within the most active anti-abortion denomination, the Roman Catholic Church. Several Catholic ethicists have asserted the conscientious nature of the abortion decision. (Pl. Exh. 36/T.2016, A.307.) The very existence of a small national organization called "Catholics For a Free Choice" (Pl. Exh. 320/R. 233) and church statements themselves further evidence dissent among Catholics.[109]

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to the teaching of God's Word and also . . . the truth of Bible-believing Christianity"; and another which exhorts that no one who has studied the evidence of fetal development and "meanwhile studied the Bible, cried out to God and called for Prayer Meeting" can speak in favor of abortion. (Pl. Exh. 138/T.3213-14, A.318; Pl. Exh. 137/T.3213-14, A.317.)

[108] The Right to Life Society of Greenville, Mississippi urges "true Bible believers must stand on the principle that abortion is unrighteous, ungodly, selfish, sinful, wrong and destructive to the will of God in his plan for the human race." (Pl. Exh. 457/R.233, A.319.)

[109] (Def.-Int. Exh. E/T. 2100-02) (Pl. Exh. 39/T.2024). A recent poll indicates that 50% of Catholics approve of "abortion on demand". Slip op. at 168. Reliance on polls in this area may be deceptive, however. Much depends on the wording of questions, e.g., whether they call forth views on the substantive morality of abortion or on the role of the state, and on how people are characterized religiously. For example, the polls cited by the district court which indicated no substantial difference between Catholics and Protestants on the question of abortion ignore critically important denominational differences in theological approach, e.g., between mainstream and fundamentalist Protestants within these sweeping categories.

Thus, internal division further demonstrates rather than obscures the religious nature of the abortion controversy. The differing positions are viewed as dictates of conscience, although they appear incomprehensible and even appalling to their adversaries. Belief that requiring a woman to "give birth. . ., without regard to any and all circumstances . . . would reduce her personhood to that of an animal and constitute a gross violation of our Christian faith" [110] and that "abortion may in some instances be the most loving act possible." [111] are conscientious positions as deeply cherished and deeply felt as the belief that abortion is murder. The question is whether the law will protect the conscience of some or the conscience of all.

10. The Legislative History of the Hyde Amendments Demonstrates the Theological Division and the Congressional Purpose To Prefer the Anti-Abortion Belief.

a. The Sequence of Hyde Amendments Reflects an Effort to Enact the Religious Doctrine That Condemns Abortion.

The district court described the irreconcilable division in the legislative process that produced the Hyde Amendment:

> The long sequence of amendments marks the effort to reach a compromise of what could not be the subject of a principled compromise result but could only become a register of the point at which the struggle of principle was arrested. Slip op. at 268.

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[110] Pl. Exh. 379/R.233. "Abortion and the First Amendment: A United Methodist Position", Policy Statement of the Board of Church and Society, Kansas East Conference of the United Methodist Church.

[111] Pl. Exh. 36/T.2016, A.307, "A Call to Concern."

When first approved by the House, the Hyde Amendment was an absolute prohibition on abortion funding, fully reflecting the underlying religious doctrine that the fetus is human life and abortion impermissible, except when indirect.[112] Annex to slip op. at 8 (hereinafter, Annex). The Senate rejected it overwhelmingly. Annex at 24; Cong. Rec. S10806-07. The Conference Report, which became the FY 77 Rider, provided a life-endangering exception, a formulation of the life-for-life principle, which is doctrinally acceptable to most of the anti-abortion faiths and politically acceptable to "right-to-life" advocates.[113] Annex at 76, 83. The Report explained the intent not to affect indirect abortion and treatment such as D.E.S., for rape and incest victims. *Id.* These treatments are also approved by the anti-abortion faiths. *Supra* at section 9(a)(1).

The struggle over abortion funding escalated in June 1977, when the FY 78 Rider had to be negotiated in light of this Court's decision in *Maher v. Roe*. The Conference Committee deadlocked over House refusal

[112] The doctrinal distinction between direct and indirect abortion was first made when the House cast a second vote insisting on its disagreement with the Senate. Mr. Hyde argued that the Amendment included an exception for life endangerment, because abortions performed in those situations are not deemed abortions. Annex at 30. (H8633-34, August 10, 1976). Examples noted were that it would not prevent removal of an ectopic pregnancy, the treatment of cancer by radiation or hysterectomy notwithstanding the incidental loss of fetal life. Annex at 35. Hyde also argued that it would not prevent D.E.S. treatment for rape victims and the use of the IUD. Annex at 30.

[113] *See* Pl. Exh. 392, 424/R. 233; Lodged, Vol. IV, Nos. 10, 11 (hereinafter indicated L. IV), which explains the political acceptability of a life exception.

to move from life-endangering[114] and Senate insistence upon enlarging the exceptions. Finally, the congressional leadership hammered out the compromise which included, in addition to life-endangerment, very narrow relief for cases of physical health damage, and rape and incest victims. Annex at 284-89.

The annual battles illustrate that the struggle is over principle rather than practical consequences. Despite only a handful of certifications under the physical health, rape and incest exceptions (see § C(3) *supra*), the House sponsors nevertheless continually tried to eliminate all but the life exception. Annex at 292, 294-95. Thus, the Hyde Amendment embodies the doctrine of the anti-abortion faiths with only those exceptions that doctrine permits or that its proponents cannot avoid.

b. The Legislative Debates Illustrate That the Hyde Amendment Was a Product of Religious Belief and Pressures Against Abortion.

The district court found:

> What can be said is that an organized effort of institutional religion to influence the vote on the

[114] Only a life-endangering exception was clearly acceptable to Hyde, the Catholic Church and its lobbying arm, the Committee for a Human Life Amendment (CHLA), and the CHLA lobbyist, who was viewed as having a decisive impact on the principal House conferees. Annex at 91-2; Pl. Exh. 45 Werner, T.2417;Pl. Exh. 305B, 305C/R.233 L. IV-20; Werner, T. 2432; slip op. at 268. After a proposal to fund in cases of grave physical health damage was almost accepted by the House conferees (Pl. Exh. 46/Werner T.2449, Proposal T) L. IV-18, the Committee adjourned. By the next morning the House conferees had returned to their life-for-life stance. (Pl. Exh. 46/Werner, T.2444). The Committee never met again.

> enactments in question on religious grounds was made, that it cannot be said that the efforts did not influence a decisive number of votes through a combination of religious belief and principle on the part of some with a fear of political reprisal on the part of others, and that the narrow votes in both houses are open to the inference that in one or the other way the religious factor was decisive of the issue for enough legislators to affect the outcome of the voting. Slip op. at 271.

In analyzing the legislative history, the district court relied extensively on the framework provided by plaintiffs-appellees' witness, Dr. Gillian Lindt, a sociologist of religion who chairs Columbia University's Department of Religion. Dr. Lindt focused on four indicia of religiosity: the purpose of the legislation; whether its sponsors sought to legitimate it, implicitly or explicitly, by religious references; whether religious belief and denominational support is used to explain positions; and, finally, whether the debate is particularly divisive in character. (Lindt, A.254.)[115] Analysis of the Hyde Amendments under all four criteria reveals the intense religiosity of their purpose. The district court found:

> The language of the debates, the arguments made, revolve around the pro-life assertion that the fetus is a human life from its beginning, and that,

[115] To avoid repetition we draw primarily on the legislative debates on the FY 78 Rider. The district court found the content of the debates did not change from one year to the next. Slip op. at 266. Unless otherwise noted, the citations which follow are to 123 Cong. Rec. (daily ed.); the dates are abbreviated and "remarks by" and titles omitted.

> therefore, abortion is either never permissible, or is permissible only in the narrowest circumstances. Slip op. at 273.

Indeed, every Representative and Senator who spoke in favor of the Riders espoused this view.[116]

The debates reveal that the proponents' view of the fetus as human life is religiously based (Lindt, A.248-49.). The district court observed the "[r]eligious motivation and allegiance to religiously perceived principle on the part of many legislators, on both sides of the issue . . . ." Slip op. at 270.

On the most obvious level, advocates of the Hyde Amendment described the fetus as being in relation to God and as having a soul.[117] Proponents repeatedly

[116] In the House, for example: "Abortion . . . is the calculated killing of . . . [a] human being . . . that is not a potential human life; it is a human life with potential." (H6084)(Hyde). Also in the House, "[T]he Amendment . . . will prevent the use of tax funds . . . to destroy human life." (H6085, 6/17/77) (Bauman).

Mr. Dornon equated abortion with the "killing of innocent life and the execution in mothers' wombs of 14 million American citizens." (H6087, 6/17). Mr. O'Brien said: "Whether the unborn child is rich or poor, it is a human life and deserves a chance to live." (H6090, 6/17). Mr. Edwards describes abortion as "snuffing out the life of an unborn child" (H6090, 6/17); and Mr. Volkmer, as "the death of unborn children." (H6090, 6/17). Mr. Russo equated a funding cutoff with "sav[ing] lives" (H6097, 6/17). Mr. Conte described abortion as "someone else's right to kill human life." (H10134, 9/27).

In the Senate: Senator Helms describes the embryo as a "tiny human being . . . waiting to be born" and as "an innocent human life." (S11036, 11042, 6/29). Mr. Domenici referred repeatedly to "unborn children" and the value of human life. (S11037, 6/29). Mr. Stennis described the fetus as "an innocent, inconvenient human being." (S11039, 6/29).

[117] Mr. Hyde argues against compromise: "[W]e ought not to allocate to ourselves the role of Almighty God" (H10969, 10/13),

characterized the fetus as innocent and abortion as a slaughter of innocents. (*See* Lindt, A.247-48.)[118] The district court observed that:

> The repeated use during the debates of 'human life' terminology extended at times to referring to the immortal soul of the fetus, to invoking Herod's slaughter of the innocent, and to emphasizing that the fetus is 'defenseless,' is 'innocent.' Much of this language is seen in the Roman Catholic literature already referred to, and it implies humanity in the fetus—for only rational beings can be 'innocent' in moral terms. Slip op. at 275.[119]

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invoking the memorial to the Jews killed in the Holocaust: "He who saves one soul, saves humanity" (H6084, 6/17). Dr. Lindt explained that "in the context of an impassioned plea for saving the lives of fetuses . . . the equation is with the fetuses being saved . . . because they too, have souls" (T.4623-24; *see also* T.4620. Mr. Dornon speaks of the fetuses' destiny as "God willed" (H6087, 6/17), and warns against inclusion even of a life-endangering exception: "God will not be mocked. We cannot continue to kill millions of innocent preborn children each year. Human beings with an immortal soul and their entire genetic code in place." (H12173, 11/3).

[118] Mr. Hyde constantly refers to abortion as "the slaughter of innocent, inconvenient unborn children" (H6083, 6/17) and the calculated killing of innocent, inconvenient human beings (H6094, 6/17, H10969, 10/13, H10834, 10/12, H10830, 10/12). Mr. Bauman (H6085, 6/17) and Mr. Dornon (H12173, 11/3), among the most frequent proponents of the Hyde position, frequently reiterate this theme.

The "slaughter of the innocents" theme permeated the speeches of the key proponents in the Senate as well. Mr. Stennis describes abortion as "the calculated killing" and the "unnecessary slaughter of innocent unborn children" (S11039, 6/29); Mr. Helms, the "deliberate termination of innocent human life" (S11036, 6/29); and Mr. Bartlett reminds his colleagues that "unborn children [are] . . . the most innocent among us." (S13673, 8/4).

[119] *See* Lindt, A.254.

Dr. Lindt testified that the religious nature of the issue was also demonstrated by the intensity of the negative value attributed to abortion.[120]

Notwithstanding frequent invocation by Hyde proponents of the scientific evidence of fetal development, the district court found the issue religious:

> There was no absence, on either side of the debate, of a sufficient knowledge of human physiology; there were no mistaken notions about the physical nature of the fetus. Indeed, it was the pro-life forces which called on the discoveries of modern science to confirm if not establish the validity of their position. Nevertheless, the insistence that fetal life has the inviolability accorded by all to the life of born human beings is not genuinely argued; it is adamantly asserted and forms the basis for much essentially religious language. Slip op. at 273.[121]

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[120] *See* slip op. at 165. The speeches constantly reiterate this value-laden perception of the abortion procedure. Defendant Hyde refers to the "abortion-chamber" (H10834, 10/12), "Slaughter" (H6083, 6/17), "calculated killing" (H6082, 6/17), "exterminate" (H10835, 10/12), the transformation of the medical profession into "executioners-for-hire" (H10133, 9/27; H10969, 10/13). Mr. Bauman refers to abortion as "murder" (H6095, 6/17; H12172, 11/3), "slaughter" (H10969, 10/13). Mr. Dornon talks of the execution of American citizens (H6087, 6/17). Mr. Bauman characterized abortions as "[T]he final solution to borrow a phrase from not too recent history." (H6095, 6/17).

In the Senate there were references to abortion as a "heinous crime" by Mr. Garn (S11035, 6/29); and as a "moral crime" by Mr. Hatch (S11038, 6/29).

[121] The district court noted as well that "much other argument . . . in the debates was free of religious reference, whether or not the debators were motivated by their religious convictions." Slip op. at 275. Dr. Lindt noted that the debates

The court noted the debators' citations to various church teachings to legitimate their positions,[122] as well as "frequent avowals . . . of religious affiliations . . . [and] upbringing" in the context of "[t]he charge that the pro-life members were seeking to impose their 'morality' or their religious views on . . . poor women and the counter-charge that the pro-choice members were preparing to require taxpayers to whom abortion was morally abhorrent to subsidize it . . . ." Slip op. at 276.[123] (*See* Lindt, T.4279; A.253.)

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must be read holistically and that seemingly secular assertions in one place are informed by religious references in another. (Lindt A.251.)

[122] Mr. Bauman identifies the leaders of the "right to life movement" as "Catholic, Protestant and Jewish" (H10831, 10/12). Mr. Percy stresses the support of religious organizations for the right to abortion, saying: "Those are organizations every bit as concerned with human life and morality as any church any of us might belong to" (S11032, 6/29).

[123] Mr. Rudd says funding discriminates against those opposed to abortion "on religious conviction or otherwise" (H6088, 6/17). Mr. Milford says: "I believe we are asking too much of those who are so morally opposed to this issue, by taking their tax money to fund the very act that violates their religious convictions" (H6097, 6/17). Mr. Stanton said "certain inalienable rights that come from God and not from man" (H6095, 6/17). Mr. Taylor adverted to raising his adopted daughter in a "Christian home" (H6089, 6/17). In the Senate, Mr. Hatch urges support for the Hyde Amendment because abortion is a "moral crime" and something about which "people feel deeply and religiously" (S11038-39, 7/29). Some voting pro-choice indicated their personal convictions against abortion: Mr. Bayh states that he came to a personal decision that the fetus is life but that "people have a right to differ on this" (S11043, 6/29). The court noted that Roman Catholic legislators who supported anything other than the narrow life-endangerment standard found the debates particularly trying. Slip op. at 268-69. Also, Mr. Kennedy: "I am opposed to abortion on demand. This opposition is based on deep moral and religious beliefs" (S11053, 6/29). Mr. Moynihan: "In my view, decisions about birth and abortion are moral and religious decisions, which must be left to each individual or family to make" (S11056, 6/29).

The district court observed that:

> [t]he pro-choice debators . . . frequently emphasized their respect for the pro-life members' views and, in so doing, manifested an evidently informed belief that the pro-life views were essentially religious.[124]
>
> * * * * *
>
> The pro-choice members argued that the abortion decision was a matter of individual conscience.[125]
>
> And there was a recognition that in the minds of some members their religious beliefs did not really leave them a free vote.[126] Slip op. at 276-77.

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[124] "If your religious convictions tell you abortion is wrong, honor them." (H6089, 6/17) (Rose). Mr. Weiss describes the Hyde Amendment as "stand[ing] in moral judgment of . . . poor women" (H6093, 6/17).

In the Senate, Mr. Percy describes the anti-abortion pickets as "deeply convinced that they have a direct source to the truth . . . and that God is on their side." (S11033, S11045, 6/29). Mr. McGovern says it "impose[s] one moral viewpoint" (S11040, 6/29).

[125] Mr. Milford, although voting to restrict funds because of religious belief, acknowledged that the decision to abort should be decided by the woman "after counsel with her own conscience." (H6096-6097, 6/17). Mr. Allen urges "compassion" and asks whether the proponents of Hyde realize the "cruelty its literal enforcement would visit upon the poor, the sick" (H6090, H6093, 6/17). "We are not Almighty God and we really cannot decide so lightly issues that lead to the agonies and suffering of other people," concluding, "I ask for mercy . . ."(H12171, 11/3)(Fenwick). Mr. Bayh states: "[Abortion] is perhaps the most deeply felt philosophical, religious and moral issue I have ever confronted" (S18582, 11/3); *See* Lindt, A.256).

[126] Mr. Bauman stated: ". . . how can any of us explain backing down and voting against this important principle of life" (H10831,

The lower court found that the pressures of a religiously mobilized single-issue constituency played a pivotal role in the debate:

> The debates reflect the members' awareness for the magnitude of the right-to-life political effort of the single-issue voting with which many were faced and which, inferentially, favored some members' electoral chances. Slip op. at 165.
>
> The members were plainly aware, were made aware, of the pressures exerted upon them by their sense of their constituencies' views on the issues and of the religious setting in which the views were entertained and expressed. Slip Op. at 277.[127]

Finally, the extraordinarily fierce emotionalism, divisiveness and inability to compromise, reflected in the Hyde debates are other indicators of the religious nature of the issue at hand. The district court found:

10/12); Mr. Mahon quotes the old hymn "Take your troubles to the Lord and leave them there," and states: "I just want my colleagues to vote their own consciences . . . I [would not] twist an arm or say an unkind word or otherwise try to pressure anyone." (H12771, 12/7). "I believe firmly that every man must render an accounting not only for every idle word but also for every idle silence" (H12773, 12/7) (Hyde). During debate on a similar funding restriction, Mr. Conte says, "I feel justified in supporting these provisions as a legitimate compromise, [b]ut . . . in good conscience, I cannot go much further" (H10836, 10/12).

[127] "I cannot possibly cast a vote on the abortion issue without making a large number of people in my district very angry . . . It's a no win situation." (H6096, 6/12) (Milford); The vote is one which "place[s] my head on the election 'chopping block' " (H6097, 6/17) (Meyner). It is "fraught with a great deal of political liability but the heat is not going to get any less . . . "(Bayh, S18583, 11/3).

> The debates were often bitterly controversial, even inflamed. The members returned to the debate again and again with expressed reluctance but with unabated resolution. The members recognized that the debates were often emotion-charged, and much of the argument, even read in the black and white of the Congressional Record, is deeply felt, personal in tone, and consciously moralistic—because the speaker sees no escape from the moral issue or from its importance. Slip op. at 277.[128]

The difficulty of compromise stemmed from the intensity and religiosity of the belief at issue.[129] (Lindt, A.252.) In the end, the resolution was satisfactory to no one but represented "only what could be negotiated across an unbridgeable gulf of principle." Slip op. at 165.

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[128] "Abortion is the most divisive basic issue I have run across in my experience" (S11030, 6/29) (Packwood). Mr. Mitchell recognizes "the passionate nature of the opposition to abortion" (H6094, 6/17); Mr. Flood: "It is an emotional problem. That is why we are here ranting and raving one way or another . . . " (H6096, 6/17); Mr. O'Brien characterizes it as "fiercely emotional" (H6090, 6/17). Mr. Obey says, "An issue like this tears my guts out." (H12171, 11/3).

[129] "It is pretty hard to compromise between people who believe strongly on one side and people who believe strongly on the other side" (S19439, 12/7) (Magnuson); "[T]here are an awful lot of us who will fight right down to the wire because of those beliefs" (S11039, 6/29) (Hatch). "[T]here is not a political question but . . . a matter of principle . . . that cannot be compromised. It is basically a principle of life" (H12491, 11/29) (Volkmer). Mr. Giaimo, speaking against the riders, "We cannot compromise a fundamental principle." (H10836, 10/12). Mr. Flood counselled against compromise: "I call upon you, who have been so sound and so faithful to your traditions and your beliefs, to again be that way. This is the House, thank God, and vote against this motion" (H12174, 11/3).

11. The Opposition to Abortion Which Produced the Hyde Amendments is Pervasively Religious in Character.

The district court considered extensive evidence on the purposes, character, organization and activities of the anti-abortion drive. This evidence, relevant to the analysis of legislative purpose under both the Fifth and First Amendments, demonstrates that the systematic hierarchical mobilization by the Roman Catholic Church had made it the backbone of the so-called "right-to-life" movement. Beyond that, and more importantly, the evidence demonstrates the religious nature of the popular movement itself. Its themes, symbolism, and advocacy are intrinsically religious; its cause is associated with God and religion; and its constituency comes principally from religious groups which share the faith commitment.

Appellees want to make crystal clear that the educational, pastoral and political activities of religious and other institutions discussed here are fully protected by the First Amendment's guarantees of free expression, petition and free exercise of religion. We do not contend that any of these activities are unconstitutional nor do we seek to restrain them. First Amendment freedoms cannot, however, insulate from scrutiny the religious background of legislation challenged under the Establishment Clause.

a. The Roman Catholic Church Has Spearheaded An Extensive Political Mobilization To Enact Their Religious Doctrine Against Abortion Into Civil Law.

The district court recognized the pivotal role of the church in the mobilization which produced the Hyde Amendments:

> In this period, the record indicates, only the Roman Catholic Church, among the institutional religions, has sought to secure the enactment of legislation that would forbid abortion, has organized educational and lobbying efforts to that end and has acted to mobilize popular support for the legislative goals. Slip op. at 280.

Since 1973, the Roman Catholic hierarchy has worked to overturn *Roe v. Wade*. Slip op. at 200.[130] In 1975 the National Council of Catholic Bishops (NCCB) promulgated the Pastoral Plan for Pro-Life Activities (hereinafter, Plan), a complete blueprint for political as well as pastoral mobilization "to bring civil law into consonance with Catholic teaching." Slip op. at 208.[131]

The Plan is unprecedented in the life of the Catholic Church in the United States (Smith, T.2142-45). Its objective is to amend the Constitution and stop public funding of abortions because a "just system of law cannot be in conflict with the law of God." (Pl. Exh. 39, p. 7). It calls for activation of official and lay structures and for the establishment of a nationwide network of parish, diocesan, and state pro-life committees to promote educational and political activity under the coordination of the NCCB's Pro-Life Activities

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[130] Abortion Hearings I, pp. 153-253.

[131] Smith, T.2140-41; Pl. Exh. 39/T.2019: L.IV-9. The district court details the elements of the Plan. Slip op. at 201-16. It found that the Plan and "The Declaration on Abortion . . . of course embody explicitly religious teaching: the Declaration 'entails a grave obligation for Christian consciences;' the Pastoral Plan speaks of 'the grave sin of abortion' as does the Declaration." Slip op. at 228.

Committee. Slip op. at 205-6.[132] Its 12-point political program is largely directed to "convinc[ing] all elected officials and potential candidates that 'the abortion issue' will not go away and that their position on it will be subject to continuing scrutiny." Pl. Exh. 39, p.12: L.IV-9. The district court found:

> There is no question that, to a very considerable extent, Roman Catholic clergymen have encouraged their parishioners to participate actively in the political effort to have a right to life amendment passed and to support the Hyde Amendment.[133]
>
> A great deal of documentary evidence is in the record showing numerous parish and diocesan publications, and some national publications, urging political action, giving information on voting records on the abortion issue of state and federal legislators, emphasizing the special importance of the abortion issue because of its connection with life values, intimating and, occasionally, advocat-

[132] In addition, the Plan declares it "absolutely necessary" to develop in each Congressional district a "tightly knit and well-organized pro-life unit [which] can be described as a public interest group or citizens lobby," and which, though not a "church agency", is to maintain close contact with the Diocesan Coordinating Committee and which "will need some financial support." Slip op. at 205-08 (Pl. Exh. 319, at 11-13.)

[133] Appellees did not try to document implementation of the Plan nationwide and the district court quite properly found it ". . . far from clear . . . [h]ow systematically the Pastoral Plan was carried out." Slip op. at 210. The Court did note evidence of implementation in some parts of the country, and "The Clergy Bulletin of the Diocese of Fargo, North Dakota, reflects in the Bishops' instructions to the Clergy, a fairly complete implementation of the program." Slip op. at 209.

> ing single issue voting, and perhaps less frequently, cautioning against voting on a single issue where many issues are involved. Slip op. at 209-10.[134]
>
> Roman Catholic clergy and laity are not alone in the pro-life movement, . . . but the evidence requires the conclusion that it is they who have vitalized the movement, given it organization and direction, and used ecclesiastical channels of communication in its support. *Id.* at 231.
>
> That the efforts of the Roman Catholic clergy and laity have produced the Hyde-Conte Amendment of 1976 and its successors cannot be found as a fact, but it is more likely than not that those efforts have been a factor that cannot be eliminated from the chain of causation. In any event, the pro-life effort, of which the organized Roman Catholic effort has been the most active component, has made use of the political process, and played a significant part in bringing about Congressional legislation on the subject. Slip op. at 281.

[134] Several exhibits from the Catholic press show frequent attention to the abortion issue on the national, diocesan, and parish levels. For example, *Our Sunday Visitor* is an official national weekly magazine. In 1977, it carried over 100 items dealing with the abortion issue; 87 were news articles or signed commentaries and 15 were editorials (Pl. Exh. 451/R. 233). The *Pilot*, published by the Archdiocese of Boston, had 47 items on abortion in 11 issues, eight on the front page. Fifteen articles attacked Governor Dukakis' veto of the state Medicaid cut-off. (Pl. Exh. 452/R.233). *See also* Pl. Exh. 335 A and B, 338, 340 A-C, 341 A, D and E, 351 A, F-K, and Pl. Exh. 450/R.233: L. IV-30, 31, 34, 35, 36, 37, 38, 39).

Parish bulletins also mobilized the constituency. Bulletins from different parts of the country—including Maryland, Pennsylvania,

b. The Record Demonstrates The Religious Themes and The Absence of a Secular Interest or Constituency in the So-Called Secular "Right-to-Life" Movement.

The fact that the Roman Church and others play a central role in the "right-to-life" movement is not alone decisive of its religiosity. It is more significant that the supposedly secular "right-to-life" groups are in fact sectarian and have no distinct secular component. The record demonstrates the religious nature of the "right-to-life" effort in two major respects: (1) the themes, symbols and advocacy of these groups are religious and (2) the constituency is drawn primarily from identifiably religious communities.

The district court found:

> The right-to-life movement, although not confined to Roman Catholics and Roman Catholic clergymen, does use religious language, invokes religious motivations, and enlists prayer as an aid. Slip op. at 228.

As in the congressional debates, the themes that predominate in "right-to-life" literature echo and elaborate upon the central teaching of the anti-abortion faiths that the fetus is a person:

> The literature of those opposing abortion speaks of embryos and fetuses as human beings, children,

Illinois, Wisconsin, Missouri and Minnesota—were submitted and the district court found that "at times [they] included some material on the abortion issue and not infrequently included a good deal of that material . . ." Slip op. at 211. Pl. Exh. 60/T.2735:L.IV-30, Pl. Exh. 78/T.2897:L.IV-31, Pl. Exh. 307A & B/R.233:L.IV-34, Pl. Exh. 309A/R.233:L.IV-35, Pl. Exh. 343A.-C.:L.IV-36, Pl. Exh. 369A,B./R.233:L.IV-37,38, Pl. Exh. 371/R.233:L-39.

> unborn children, the innocent unborn, and it personifies them. Abortion is characterized as murder. Slip op. at 229.

The literature refers to the fetus, explicitly or implicitly, as having a soul, pleading to be saved.[135] The religious theme is also implicit in constant references to the "innocence of the unborn" and Herod's slaughter of the Innocents. Slip op. at 229-30.[136] The district court found that the anti-abortion movement is pervaded by religious symbolism[137] and "kept alive . . . by

[135] The New York State Right to Life Committee (NYSRTLC) calls its raffle "Save a Baby" (Pl. Exh. 429, 431/R.233) and refers to the fetus as "our little ones" (*Id.*). Henry Hyde describes "the soul of the unborn child" as a "little bit of infinity" (Pl. Exh. 462/R.233; A.312); The Human Life Amendment Group's flier "Abortion is Murder" cites the Old and New Testament to prove this point (Pl. Exh. 347/R.233; A.309). NYSRTLC newsletters speak of "our 'little ones' who can now only speak to their Creator" (Pl. Exh. 431, p. 2/R.233) and "the denied ones" (Pl. Exh. 432/R. 233 L. IV-27); a retired Bishop, chaplain of the Knights of Columbus, speaks of the "tiny, unsilenced, haunting voice of the murdered unborn child." Slip op. at 229, Pl. Exh. 348/R.233: L.IV-26.

[136] *See also* Pl. Exhs. 424, p. 4, 429, 431, p. 2, 348, p. 2-3/R.233. Taxpayers urging opposing Medicaid funding refer to "Precious Holy Innocents of today's world." (Pl. Exh. 368/R.233.) Illinois Citizens Concerned For Life refers to the "innocent lives of the unborn children," stating "the slaughter of unborn must be stopped." (Pl. Exh. 345B) *See also* Pl. Exhs. 345A; 363, p. 2: L.IV-24; 368; 469E.

[137] Pictures of the 1978 "March for Life" show rosaries in the hands of various marchers and draped over the "Stop Abortion" banner. Other marchers carry signs, "Pray the Rosary," "The Lord Giveth and the Lord Taketh Away," and "Jeremiah 1:5, Before I Formed You In The Womb I Knew You." (Pl. Exh. 456A/R.233, A.328; *see also,* Pl. Exh. 424/R.233.)

Some Knights of Columbus banners and a statue of the Virgin Mary are prominently carried, and the March for Life leaflet refers to the red roses, widely used by the anti-abortion move-

the practice of having prayers said and services conducted in direct relation to the pro-life activity."[138]

The anti-abortion effort describes itself as a crusade carrying forth God's work, on a mission against the devil.[139] The 1978 "March for Life" leaflet declares "[W]e continue to wage the necessary, just and peaceful war against the evil of abortion and all other evils which have come in its wake . . . [P]ro-lifers continue the battles so that good can triumph over evil." [140]

Henry Hyde's comments before the supposedly secular Maryland State Right to Life Convention banquet highlight the pervasive religious identification and fervor of the anti-abortion movement.

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ment, as "symbols of short life and martyrdom." (Pl. Exh. 308/R.233, A.326).

[138] Slip op. at 228-31 (Pl. Exhs. 305A; 305B, L. IV-19; 454; 340 B,C; 420/R.233, A.321; 308/R.233; 68/T.2554; Pl. Ex. 438/R.233).

[139] A large, red, white and blue billboard in St. Louis proclaims, "God is Pro Life," (Pl. Exh. 312A/R.233, A.311.) A banner at the 1978 March for Life reads, "Lutherans for God, Country and Human Life Amendment" (Pl. Exh. 456B/R.233, A.327.) The NYSRTCL newsletters and mailings refer to God's blessings, the "work [to] which we have all been called," activists as "indispensable to a movement that is truly God-inspired," and the annual RTL convention as "[j]oy in doing God's work for the denied ones . . . ." (Pl. Exhs. 429/R.233, A.322; 435/R.233; 432/R.233; 453/R.233, A.329; 400/R.233; Pl. Exh. 420/R.233, A.321.)

[140] Pl. Exh. 308/R.233, A.326, Slip op. at 229. Those who support the "sin" of abortion are sternly warned "God can send devastating storms, floods, epidemics, pestilences" (Pl. Exh. 348 at 4/R.233); and that "on judgment day, you will be held accountable." (Pl. Exh. 368/R.233, A.315.) An early effort to generate parish activism argued that "Catholics and Protestants . . . [should] reset this nation upon the theocentric foundation laid down by the Protestant Founding Fathers" (Pl. Exh. 363/R.233: L. IV-24).

> When . . . the final judgment [comes], you are there alone standing before God and a terror will rip your soul like nothing you can imagine. I really think that those in the pro-life movement will not be alone. I think there'll be a chorus of voices that have never been heard in this world but are heard very beautifully and very loudly in the next world and I think they will plead for everyone who has been in this movement and they will say to God, "Spare him, because he loved us." And God will look at us and say not, "Did you succeed?" but "Did you try?" (Pl. Exh. 462, p. 10/R.233, A.313).

The record reveals that basic religious themes pervade all anti-abortion literature.[141] The record does not, on the other hand, indicate any secular constituency mobilized against abortion.

The district court found that the "right-to-life" movement is not exclusively Roman Catholic: the "union of effort with . . . other denominations is based on shared religious conviction." Slip op. at 232. Indeed, appeals for support beyond the Catholic community generally emphasize the desirability of activating other religious groups.[142] Clear secular concerns such as ma-

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[141] The content of the appeal differs depending on the religious community to which it is addressed. Thus, where the constituency is primarily Catholic, the approach tends to be more philosophical. Where the constituency is fundamentalist, reliance on scripture is common. For example, the Greenville, Mississippi Right-to-Life newsletter opens with an editorial entitled "Why Bible-Believers Oppose Abortion" which lists 10 biblical verses and concludes "the true Bible-believer must stand on the principle that abortion is unrighteous, ungodly, selfish, sinful, wrong and destructive to the word of God in His plan for the human race." (Pl. Exh. 457, R.233, A.319).

[142] In the midst of the debate over the FY 78 Hyde Amendment, the Committee for a Human Life Amendment alerted its network

ternal health or even life are uniformly disregarded except insofar as politically expedient. As in the Congressional debates, biological information is frequently cited in the popular literature, but is consistently entangled with religious references. Slip op. at 228. The record demonstrates overwhelmingly that the "right-to-life" conviction that the fetus is a human life from the moment of conception is religiously derived and religiously legitimized and that the movement, in all its aspects, is religious.

12. The Fabric of Our Society is Increasingly Threatened by the Religious Mobilization Against Abortion.

To the framers of the First Amendment, religious struggles for state power—whether to advance wealth or to enforce faith—were among the greatest dangers to basic liberty and the survival of a robust but tolerant pluralistic society. The record reveals that the religious mobilization to eliminate the religious and conscientious liberty protected by *Roe v. Wade* is producing the very sectarian strife and political fragmentation against which the First Amendment was designed to stand guard.

With respect to the religious division over abortion, the district court found:

> What ultimately emerges from the facts . . . is that the major religions whose views were presented all regard abortion as presenting religiously framed questions of moral right, moral duty and

to seek support in terms of signatures, clergy visits, and prayer vigils from "pro-life" ministers, priests, and rabbis (Pl. Exh. 305A,B /R.233; L.IV-19). *See also* Pl. Exh. 364/R.233: L.IV-14; Pl. Exh. 28/R.233: L.IV-28.

> conscience, that they are in disagreement on the appropriate rules of conduct but in agreement that abortion is a morally grave undertaking in any circumstances, and that their sharpest disagreement concerns the role of civil government. Slip op. at 280.

The record shows that the mobilization against abortion rights has invoked deep concern for the future of ecumenism. On both sides of the controversy, abortion is seen as the "chief issue," an "albatross" for Christians.[143] (Pl. Exh. 351G/R.233), and the "one issue of greatest division today." (Wogaman, T.1997).

The anti-abortion mobilization is widely seen as an effort to impose one segment of religious morality. Despite the normal reluctance to risk ecumenical accord, many denominations[144] and prominent theolo-

[143] The sectarian discord generated by the effort to enact the Hyde Amendments was calmed by the original injunction in this case:

> [W]hen the Hyde Amendment was first . . . proposed and adopted [t]here was a gathering storm of . . . controversy . . . a conflict among religious groups . . . which was noted in the newspapers at the time as a danger, a risk. [T]hen when . . . this Court enjoined the . . . Hyde Amendment, that put the conflict aside . . . for a period of time . . . . It was more generally understood that the dialogue would go on about the religious question . . . among scholars and people in the religious sphere and the public sphere. (Wogaman, T.2001-02).

[144] The Religious Coalition for Abortion Rights (RCAR), comprised of 27 national religious organizations, was formed to oppose the activities of "a vocal minority [that] would . . . nullify the Supreme Court decisions . . . [and impose] [o]ne theological view . . . on Americans of all faiths." Slip op. at 232-33 (Pl. Exh. 320/R.233: L.IV-2). In 1974, the American Baptist Churches decried "the present national effort of the National Conference of Catholic Bishops in the U.S.A. to coerce the conscience and per-

gians[145] have publicly decried this effort. The Church mobilization has also drawn strong criticism from within the Church for imposing a particular moral view, threatening pluralism, substituting coercion for persuasion, and generating single-issue politics. Slip op. at 216-23 (Pl. Exh. 300, 486b).[146]

Communication is not always so restrained, as disputation gives way to invective. The same accusations that pervade the legislative debates are polarizing the religious community.[147]

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sonal freedom of our citizens through the power of public law in matters of human reproduction." (Pl. Exh. 133/Wood, T.3194; *see also* Pl. Exh. 135/Wood, T.3196).

[145] When the FY 78 rider was being debated in Congress, over 200 Protestant, Jewish and Catholic ethicists signed a Call to Concern protesting "the heavy involvement of the bishops of the Roman Catholic Church in a campaign to enact religiously-based anti-abortion commitments into laws." Slip op. at 234-35 (Pl. Exh. 36/T.2016, A.307: L. IV-1.) Acknowledging the right of all to seek laws consonant with their own religious beliefs, the Call nonetheless considered the Catholic Church's institutional activities inappropriate on this issue because curtailment of abortion rights "would violate . . . deeply held religious convictions." (*Id.* A. at 308.)

[146] The Lutheran Church-Missouri Synod recognizes that laws which reflect the "religious credo" of a minority have no title to public authority. Slip op. at 178.

[147] *E.g.*, a Roman Catholic Archbishop calls pro-choice supporters necrophilic and equates abortion with the Nazi Holocaust (Pl. Exh. 319/R.233: L.IV-41); the *Wanderer*, a Catholic weekly, comments that abortion is worse. Outraged rabbis, joined by other religious leaders, score these affronts to their morality and to the memory of six million Jews as "demagoguery" and "obscene." Slip op. at 233-34. (Pl. Exh. 490.) Rev. Wood compared abortion with the "open debate" on parochial school funding: "When we talk about political divisiveness on the part of religion . . . we haven't seen yet in the history of this country, what we would have if, indeed, the Right to Life Movement is able to enact its position into law through abridging the First Amendment . . . It will be

A movement which assumes God-given authority to stop abortion "murders" inspires not merely violent epithets but violent acts against abortion clinics as well. Slip op. at 235-36.[148] Although the individuals responsible for these attacks have not been identified, "the issue is one which lends itself to extremes of expression and to easy incitement to anger and violence." Slip op. at 237-38.[149]

The district court found that the anti-abortion mobilization is creating political divisiveness along religious lines. The court said:

> The abortion issue has become an important part of the electoral and legislative processes since 1973. The evidence does not, of its nature cannot, demonstrate that the abortion issue has begun to dominate politics. Equally it cannot be said that the abortion issue has not decided any elections. Practical reason gives assurance that it must have done so, that the forces to produce that result

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divisive in a way we have never imagined in the past." (T.3225-26.)

[148] On Ash Wednesday, 1977, the Planned Parenthood Clinic in St. Paul, Minnesota, suffered extensive damage from arson. Slip op. at 235. Attempted firebombing and vandalism has been reported in Omaha, Cleveland, Columbus, Cincinnati, Akron and Burlington, Vermont. Slip op. at 236. (Pl. Exhs. 395, 396, 402, 404.)

[149] Plaintiffs ask this Court to take judicial notice of the fact that, subsequent to the trial in this case, on the afternoon of February 15, 1979, when scores of people were in the Bill Baird Center, an abortion clinic in Hempstead, New York, the Center was destroyed by fire. New York *Times*, February 16, 1979, at B1:6. The arsonist, who stated his opposition to legal abortion, was later acquitted by reason of insanity. New York *Times*, October 31, 1979, at B2:5.

have been often deployed, and that they could not have failed uniformly. Slip op. at 264-65.

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[T]he issue is seen as alive with considerations of specifically religious morality . . . . Slip op. at 265.

* * * * *

[S]ingle-issue voting [is] almost inevitably encouraged by the bitterly controversial abortion issue. . . . Slip op. at 266.

The tendency of religious issues to assume single-issue importance to the exclusion of other issues in the political arena is more apparent with regard to the abortion issue than with any other in our time.[150]

Minnesota, where the mobilization began even before *Roe v. Wade*, illustrates the direction and impact of the Church and right-to-life efforts on the political process. Slip op. at 247-64. As a result, abortion had become by 1976 the overarching and, in many cases, the sole issue upon which the political process within the Democratic party divided.[151] The political situation

[150] The Pastoral Plan is understood by many to encourage single-issue voting and it has had that effect despite disclaimers of absolute singlemindedness from the hierarchy. Slip op. at 210, 217-23.

[151] Parishioners were mobilized to vote "pro-life" through the scheduling of special masses on the day of the electoral caucuses. The statewide diocesan paper, the *Catholic Bulletin*, repeatedly stressed the singular importance of the abortion issue, published polls of the candidates' abortion positions, carried pre-election advertisements which in some cases emphasized candidates' anti-abortion stance; churchgoers were leafleted with fliers stressing the "Catholic" and "Christian" duty to vote pro-life, regardless of

in Minnesota today is "much worse," and has "overtones of a holy war" which were not present even in the divisive conflict over the Vietnam war where religiosity was not involved. Slip op. at 246 (Peek, A.235.)

Single-issue divisiveness is perhaps best illustrated by the annual debates over the Labor-HEW riders themselves, where abortion is often the only matter requiring a Conference Committee and ultimately the most difficult question to resolve.[152] The annual struggle over Labor-HEW appropriations is replicated whenever a bill comes up which remotely affects abortion.[153] In the equally heated debates over abortion coverage in the Pregnancy Discrimination Act, Representative Clay underscored the dangerous religious nature of the anti-abortion pressure on the Congress:

party affiliation; and the Church provided intensive organizational and financial support to Minnesota Citizens Concerned for Life. The Peek campaign in 1972, detailed in the district court's opinion, illustrates the chilling effect of church intervention on Catholic supporters and the vilification that the abortion issue inspires. Slip op. at 242-47 (Peek, A.233.)

[152] The tendency of the abortion issue to assume single issue importance is also illustrated by the fact that in 1976, during the Presidential campaign and the debates on the FY 77 rider, NCCB representatives visited Governor Carter and President Ford. They confined their public remarks to the candidates' positions on a constitutional amendment. Despite the NCCB's later statement of nonpartisanship, "the effect of which is necessarily a matter of conjecture," slip op. at 242, the press "saw both candidates as trimming their sails to meet the seeming NCCB wind." *Id*. The candidates were reported as opposing federal funding for abortion and the Hyde debates themselves reflected keen awareness of the pressures created. Annex at 67, 69. Although one can never prove a causal connection, it is notable that the Amendment succeeded in 1976 where it had failed the prior year.

[153] Funding riders generally tracking the Hyde provisions have been tacked on to virtually every appropriations bill which con-

> This amendment is history repeating itself. It is a concept of the Holy Wars all over again, the heathen must be conquered and converted. This amendment says in effect that we must impose our code of morality, indeed our religious views, on those who would exercise their right to freedom of religion . . . . It has indeed become the albatross for all legislation, regardless of the merit of the legislation being proposed. (Pl. Exh. 302 at 25-6.)

Under our Constitution, no court has power to take religion, and the divisiveness it entrains, out of politics—nor should it. It has the power, and indeed the duty, however, to invalidate religious legislation which destroys freedom of conscience and renders scapegoats those most vulnerable, so long as efforts to amend the Constitution have failed.

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tains funds for abortion. Because of its report supporting *Roe v. Wade*, a rider precludes the Civil Rights Commission from even "apraising . . . studying and collecting information about laws and policies . . . with respect to abortion." (Pl. Exh. 296a/R.233.) Slip op. at 38-41.

SUMMARY OF THE ARGUMENT

I

The district court held that the Social Security Act requires that states provide all medically necessary services, including medically necessary abortions. That holding is undisputed by the Defendants. See Brief of Appellants in *Williams v. Zbaraz*, pp. 43-4, n.23. The district court further held that the Hyde Amendments modify the mandate of the underlying statute. Plaintiffs-Appellees ask that the holding of the district court on the effect of the Hyde Amendment be reversed and rely upon the Brief submitted by Appellants in *Williams v. Zbaraz*.

II

The affirmative exclusion of payment for medically necessary abortions from a program that otherwise prohibits exclusion of medically necessary services on the basis of diagnosis raises constitutional issues very different from those decided in *Maher v. Roe*, 432 U.S. 464 (1977). The Hyde restrictions burden interests of women and physicians that were not present or asserted in *Maher*. The Hyde restrictions burden the ability of the woman and her physician to act to protect her life and health, while the policy approved in *Maher* respected those interests by providing funding where there was a medical need for abortion. This Court's decisions affirm the central importance of the individual's interest in the protection of life and health, both in the abortion context and generally. *Roe v. Wade*, 410 U.S. 113 (1973); *Colautti v. Franklin*,

439 U.S. 379 (1979); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974). The Hyde restrictions also burden interests of religious and conscientious freedom not presented or considered in *Maher*. The degree of the burden imposed upon women and their physicians is much greater than that involved in *Maher*, where only elective, nontherapeutic services were denied. The trial court found that the effect of the Hyde restriction has been to deny funding to women whose pregnancies pose a threat to health and to life. Exclusion of funding for medically necessary services makes it impossible for physicians to practice medicine in accordance with minimal professional standards. Congress has not simply refused to extend a benefit, but rather has taken affirmative action to destroy the statutory entitlement and impose a burden upon one, sex-specific group of people otherwise entitled to medically necessary services under Medicaid. *Nashville Gas v. Satty*, 434 U.S. 136 (1977); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1973); *Bellotti v. Baird*, 428 U.S. 132, 147, 149-50 (1976); *Zablocki v. Redhail*, 437 U.S. 374 (1978). In *Maher* the Court found that the policy denying payment for elective abortions furthered a legitimate state interest in "encouraging normal childbirth." 432 U.S. 374. The trial court found that where medically necessary abortions are denied, normal childbirth is impossible. No other legitimate interests are advanced in support of the exclusionary classification.

The district court here found that the actual purpose of the Hyde legislation was to prevent abortions, to protect fetal life. The denial of payment precisely for the purpose of burdening and denying the freedom of women and physicians to choose medically necessary

abortions is unconstitutional. *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1972); *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975); *Board of Engineers v. Flores de Otero*, 426 U.S. 572, 605 (1978).

III

The Hyde exclusion creates a classification distinguishing women with health threatening pregnancies from all other Medicaid eligible people in need of medical services. The district court found that the classification violates the equal protection component of the Fifth Amendment. All the factors that distinguish this case from *Maher* dictate that this classification be subject to more than a minimal level of scrutiny. Even under the most deferential standard of review, the classification is unconstitutional because it is not reasonably related to any legitimate government interest.

IV

The district court decision should be affirmed on the ground that the due process guarantee of fundamental fairness protects individuals from arbitrary governmental action demanding the sacrifice of life, health and privacy. *Zablocki v. Redhail*; *Carey v. Population Services International*, 431 U.S. 678 (1977).

V

The district court found that the Hyde Amendment is so "uncertain of meaning" that physicians "cannot divine what medical standard it implies." Slip op. at

322-23. The trial court held that the vagueness of the standard further confirms the Hyde Amendment's failure to meet minimal due process standards. We ask this Court to affirm this holding.

Statutes regulating abortion must give physicians the latitude necessary to make medical judgments. *United States v. Vuitch*, 402 U.S. 62 (1971); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Colautti v. Franklin*, 439 U.S. 379 (1979). The Hyde standard chills the exercise of medical judgment because doctors are unable to understand or apply it, and because they have been threatened with investigation and prosecution for failing to apply it correctly. The result has been that Medicaid has been denied even to that very limited group of women with life-threatening conditions for which entitlement theoretically exists.

VI

The district court held that the Hyde exclusion impermissably burdens the liberty of conscience and conscientious action of women whose religious convictions counsel consideration of abortion, and therefore violates the First Amendment Free Exercise Clause and the Fifth Amendment. This judgment should be affirmed. The evidence shows that the abortion decision is a matter of paramount concern in all major religions. The free exercise guarantee of the First Amendment protects the individual's right to act in accordance with religious or conscientious belief. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *United States v. Seeger*, 380 U.S. 163 (1965).

Withdrawal of Medicaid entitlement for medically necessary abortions substantially interferes with a poor woman's religious decision whether to bear a child. Religious liberty may not be infringed by the denial of benefits or privileges. Public benefits may not be offered on conditions that inhibit or deter the exercise of First Amendment rights. *Sherbert v. Verner*; *Elrod v. Burns*, 427 U.S. 347 (1976).

VII

The district court found that the Hyde restriction does not violate the First Amendment's prohibition against establishment of religion. This holding should be reversed. The legislative history shows that the restriction represents the enactment, into civil law, of a religious belief that the fetus is a human being from the moment of conception. *Epperson v. Arkansas*, 393 U.S. 97 (1969). While all religions regard the abortion decision as a matter of fundamental religious concern, beliefs about the nature of the fetus and the abortion decision are sharply divided.

The Hyde Amendment has a primary effect of advancing one religious belief and placing the "power, prestige and financial support" of the government behind the view that the fetus is a human being. *Engel v. Vitale*, 370 U.S. 428, 431 (1962); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). It serves no secular purpose. Struggle over the Hyde restriction has produced a destructive entanglement of government and religion. *Engel v. Vitale*; *Lemon v. Kurtzman*, 301 U.S. 602 (1971).

ARGUMENT

I.

TITLE XIX OF THE SOCIAL SECURITY ACT REQUIRES STATES TO FUND MEDICALLY NECESSARY PHYSICIAN AND HOSPITAL SERVICES, INCLUDING ABORTION SERVICES, AND PROHIBITS EXCLUSIONS BASED ON DIAGNOSIS.

The United States recognizes that, apart from the Hyde Rider, the Social Security Act requires states to fund all medically necessary physician and hospital services, and prohibits exclusions based on diagnosis. *Brief for the United States, Williams v. Zbaraz,* Nos. 79-4, 79-5 and 79-491, p. 43 n. 23. The Act specifically prohibits governmental interference with physician discretion in determining medical necessity and prescribes the exclusive, professionally controlled, mechanisms for professional review of the necessity of medical services. The requirements of the Act are canvassed in the Brief of the Appellees. *Williams v. Zbaraz, supra* at 71-129. *See: McRae v. Harris,* slip op. at 16-20, 294-96. Nine federal district courts, four circuit courts, and two state supreme courts haved found that the Social Security Act mandates funding for medically necessary services and prohibits exclusions based on diagnosis.[154] The Hyde Amendment does not relieve states of their duty under the Social Security Act to cover all medically necessary abortions. See Brief of Appellees, *Williams v. Zbaraz, supra* at 130.

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[154] *Supra*, note 23 and *D.R. v. Mitchell*, 78-1675 (10th Cir., March 10, 1980).

II.

THE HYDE RIDERS' AFFIRMATIVE EXCLUSION OF MEDICALLY NECESSARY ABORTIONS FROM A PROGRAM PROVIDING OTHERWISE COMPREHENSIVE ENTITLEMENT TO MEDICALLY NECESSARY SERVICES RAISES CONSTITUTIONAL ISSUES CRITICALLY DIFFERENT FROM THOSE RESOLVED IN MAHER V. ROE.

The Court below found that:

> The Medicaid legislation expresses the concern of the nation and state with health, and with providing health care for the . . . needy. *Roe* v. *Wade* and *Doe* v. *Bolton* defined the pregnant woman's fundamental right of decision largely in terms of the medically warranted abortion as a protected alternative to childbirth . . . . On the other hand, *Beal*, *Maher*, and *Poelker* read as cases in which there was no health care need for an abortion. . . .
>
> The concern of Medicaid is with the problem pregnancy that, as such, requires medical treatment. . . . To overrule the medical judgment, central as medical judgment is to the entire Medicaid system, and withdraw medical care at that point because the medically recommended course prefers the health of the pregnant woman over the fetal life is an unduly burdensome interference with the pregnant woman's freedom to decide to terminate her pregnancy when appropriate concern for her health makes that course medically necessary. Slip op. at 310-12.

The Hyde restriction is fundamentally different from the policy approved in *Maher v. Roe*, 432 U.S. 464 (1977). There the state respected the interest of the woman and her physician in protecting her health; here that interest is ignored. There the policy affected women who sought only elective abortions; here the impact of the restriction falls on pregnant women whose health makes abortion medically necessary. There the state sought to serve a legitimate interest of "encouraging normal childbirth," 432 U.S. 474; here normal childbirth is impossible and no other legitimate interest is advanced. Indeed, the evidence clearly demonstrates that the actual purpose of the Hyde restriction is to prevent the exercise of constitutional rights.

While both cases involved Medicaid funding for abortions, the funding schemes differ in both form and effect. The Connecticut policy challenged in *Maher* provided Medicaid payments for all abortions certified by a physician as medically necessary,[155] and the *Maher* plaintiffs therefore sought to have abortions treated more favorably than other services provided under Medicaid. Plaintiffs here ask only that abortions be treated the same as all other medical procedures under

[155] In its argument to the Supreme Court, Connecticut said:

> [Medicaid] is a program designed to provide medical services which are necessary for the recipient's health. Abortion, just as a tonsillectomy, a hysterectomy or other medical service, is paid for under the program if it is medically necessary for the patient's health. . . . A state regulation which attempted to *exclude* from coverage under Medicaid an abortion wich *was* medically necessary for the patient's health might well run afoul of the equal protection clause as invidious discrimination. That is not the case here. Connnecticut makes no invidious discrimination against abortion under its Medicaid program. *Maher v. Roe*, *Brief of the Appellant*, p. 12 (emphasis in original).

a Social Security Act which requires that Medicaid programs pay for all medically necessary services. In other words, the *Maher* policy was passive; it simply did not extend the scope of Medicaid to include payment for elective services, not required by federal law to be included within Medicaid. *See: Beal v. Doe*, 432 U.S. 438, n. 3. By contrast, in enacting the Hyde Amendments, Congress affirmatively withdrew funding to which plaintiffs would otherwise be legally entitled. Congress, in the Hyde Amendment, singles out abortions and denies women with high risk pregnancies medically necessary services provided to all other poor people in comparable need.

The Hyde prohibition thus does not merely fail to extend a benefit not otherwise available, but it imposes a substantial burden that no other group need suffer. *C.f. Nashville Gas v. Satty*, 434 U.S. 136 (1977). Moreover, in affirmatively reaching out to destroy entitlement to essential medical services, the Hyde restrictions deliberately sacrifice the most basic life and liberty interests of vulnerable citizens. Hence the unconstitutionality of the Hyde exclusions does not rest on an abstract notion of a right to funded abortions, but rather on the fact that funding for medically necessary abortions, like that for all other medically necessary procedures is otherwise guaranteed by the statutory scheme and its exclusion serves no legitimate purpose.

As the Court of Appeals for the Eighth Circuit recently noted, *Maher* "laid down no *per se* rule," legitimizing restrictions on abortion funding however impermissible the purpose or devastating the impact of those restrictions. *Reproductive Health Services v.*

Freeman, No. 79-1275, slip op. at 19-20 (8th Cir. 1980). Rather, "the ultimate test of whether constitutionally protected interests are being impinged upon is not simply the form that the state interference takes but the effect." *Id*. The Hyde restriction differs from the policy approved in *Maher* in terms of the nature of the rights affected, the harshness of the burden created, the classification drawn, and the government interests asserted. These differences, discussed in this section, amply support the conclusions of Sections III and IV *infra*, that the Hyde restriction violates the due process and equal protection guarantees of the Fifth Amendment.

A. The Hyde Restrictions Impinge Upon Important Interests of Patients and Physicians.

The Hyde restrictions burden three interests of women and physicians which were not asserted in *Maher*, and which this Court has recognized as constitutionally significant: first, the interest in protecting life and health in the abortion context; second, a more general individual interest in protection of life and health; and third, the individual freedom of conscience and religious choice. The policy upheld in *Maher*, which provided for all medically necessary services, respected the interest of a woman and her physician in protecting her life and health. The exclusion created by the Hyde Amendments emphatically does not.

In *Roe v. Wade*, 410 U.S. 113, 152-53 (1973), this Court recognized an overriding interest in the health of pregnant women, from which *Maher* did not retreat. 432 U.S. at 475. *Wade* also recognized a state interest in the potential life of the fetus. However, even after

viability is reached, when the state's interest in the protection of potential life becomes compelling, the pregnant woman's health is still of overriding importance. As the Court said in *Wade*, 410 U.S. at 165, and reaffirmed in *Maher*, 432 U.S. at 472, if an abortion is "necessary, in appropriate medical judgment, for the preservation of the life *or health* of the woman, even after viability, a state may not prohibit it." (emphasis added) *See: Colautti v. Franklin*, 439 U.S. 379 (1979).

The woman's health and the physician's role in protecting it are a central theme of this Court's abortion decisions since *Wade*. *Doe v. Bolton*, 410 U.S. 179 (1973), the companion case to *Wade*, repeatedly emphasized "the patient's [medical] needs and . . . the physician's right to practice." 410 U.S. at 199 and *passim*. The *Bolton* Court also stressed that "the medical judgment may be exercised in the light of all factors— physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." 410 U.S. at 192. This leeway, said the Court, "allows the attending physician the room he needs to make his best medical judgment . . . room that operates for the benefit . . . of the pregnant woman." *Id*.

This Court has continued to emphasize the importance of the woman's health in the abortion context. *Connecticut v. Menillo*, 432 U.S. 9 (1975), held that in order to protect women's health, states could constitutionally criminalize abortions performed by nonphysicians at any time during pregnancy. *Id*. at 11. *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) and *Bellotti v. Baird*, 99 S. Ct. 3035 (1979), confirm the supremacy of the health and choice interests of the woman

and physician over concededly legitimate concerns of the state in encouraging husbands and parents to participate in abortion decisions. *Colautti v. Franklin*, reaffirms that "the abortion decision in all its aspects is inherently and primarily, a medical decision," 439 U.S. 379, 387, holding that Pennsylvania's protection of the potentially viable fetus unduly burdened the interest in protecting the woman's life and health.

Danforth, *Colautti* and *Bellotti* all involve legitimate state interests.[156] But this Court has held that even these interests may not be furthered in ways which unduly burden the freedom of the woman and her physician to protect her health. Here, by contrast, no legitimate interests are furthered by the Hyde Amendments' denial of payment for medically necessary abortions. *Infra* pp. 128 *et seq.* If the government may not serve legitimate interests in ways that unduly burden and demand sacrifice of women's life and health, *a fortiori* the state may not impose such burdens and demand such sacrifice when no legitimate public purpose is served.

Every member of this Court, even those who would not agree that a woman has a fundamental right to abortion, has recognized that basic due process princi-

[156] Indeed the interests which the state sought to promote in these cases are often undermined by the Hyde restriction. Teenagers are denied medically necessary abortions, even where the pregnant child, the physician and the parents concur that abortion is the apropriate and necessary response to pregnancy. Poor women are denied abortions, even when their husbands and children support the decision of the woman and her physician that a health threatening pregnancy should not be continued. *See: Carey v. Population Services International,* 431 U.S. 678 (1976), particularly the concurrence of Mr. Justice Powell.

ples demand that the woman's interest in preserving her life and health be accorded greater importance than the asserted interest in fetal life. Mr. Justice White, writing for himself and Justice Rehnquist in *Wade* and *Bolton*, carefully directed his dissent to recognition of the right to abortion for reasons other than preservation of women's "life *or health*". 410 U.S. at 221. In a separate dissent in *Wade*, Justice Rehnquist found that, even under the minimal rationality test applicable to economic and social legislation set forth in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955), abortion could not be completely prohibited. 410 U.S. at 173.

In *Maher*, Connecticut expressed "a value judgment favoring childbirth over abortion," 432 U.S. at 474, but this did not extinguish the health interest in the *Wade* balance. Funding was provided for all "medically necessary" abortions at all stages of pregnancy. To the extent that the private abortion decision had a medical dimension, the state stood ready to bear the medical costs for it.

Quite apart from the abortion context, this Court has recognized the essential importance of the individual interest in preserving life and health. In *Memorial Hospital v. Maricopa*, 415 U.S. 250 (1974), the Court characterized medical care as a "basic necessity of life," 415 U.S. 259, and struck down a policy denying nonemergency medical care to new residents, even though emergency services were made available. Legitimate state interests may not be pursued by means which impose a significant detriment upon individual health. *Carey v. Population Services International,* 431 U.S. 678, 716 (1977) (Stevens, J. concurring.)

The right to act to protect personal life and health has deep constitutional roots. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), upheld a mandatory vaccination law on the ground that the state's interest in protecting public health was so strong as to override traditional rights of parents to determine the medical treatment appropriate for their children. Yet, notwithstanding the great weight of the public health concern, the Court made clear that the state could not compel an individual to be vaccinated:

> If it be apparent or can be shown with reasonable certainty that he is not at the time a fit subject of vaccination, or that vaccination by reason of his then condition, would seriously impair his health, or probably cause his death. *Id.* at 39[157]

Finally, the interest which plaintiffs here assert in relation to medically necessary abortions is different than the interests considered in *Maher* because the evidence presented in the Court below established that the theological doctrine of mainstream Protestant and Jewish traditions teach that where pregnancy threatens a woman's physical or mental health, the woman and her physician are obligated to make a conscientious choice whether to continue the pregnancy or end it through abortion. *See* Facts, *supra*, §9. This theological evidence was not presented or considered in *Maher*.

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[157] *See also: Estelle v. Gamble*, 429 U.S. 97 (1975). Mr. Justice Stevens states "denial of medical care is surely not part of the punishment which civilized nations may impose for crime." n. 13. Although he was dissenting on other grounds, there is no indication that the majority disagreed on this point.

B. The Hyde Restriction Places Enormous Burdens Upon Poor Women and Their Physicians.

In evaluating the constitutional fairness and reason of legislation touching upon individual rights and freedom, the Court considers the degree of the burden imposed. For example, a one year durational residency requirement imposes an unconstitutional burden on the right to vote and travel, *Dunn v. Blumstein*, 405 U.S. 330 (1972), but a 50-day residency requirement is constitutionally permissible, *Marston v. Lewis*, 410 U.S. 679 (1973). The sole distinction lies in the degree of the burden. Similarly in *Califano v. Jobst*, 434 U.S. 47 (1977), the Court upheld a policy having an incidental effect upon freedom to marry, but in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Court invalidated a policy creating a more significant burden on that freedom. The impact of the Hyde Amendment is much greater than the effects found permissible in *Maher*.

The record shows four effects of the Hyde restriction, none of which were at issue in *Maher*. First, the Hyde restrictions have virtually eliminated federal funding for abortions, and have had the effect of denying federal funds even in the very limited category of life-threatening situations in which Congress intended that funds would be paid. *Supra* p. 22.

Second, the Hyde restriction has forced some women to carry health threatening pregnancies to term, with consequent aggravation of often precarious conditions. That was emphatically not the impact of *Maher*, where only elective, nontherapeutic abortions were involved. Some women have had no choice but to bear children that their physicians have every reason to believe will

be deformed. Some will suffer life long disability and face an earlier death. For others, particularly teenagers, future reproductive capacity has been destroyed. *Supra*, p. 47.

A third effect of the Hyde restriction has been to force women to deprive children of subsistance in order to obtain medically necessary legal abortions, or to obtain less espensive illegal abortions, or to perform abortions on themselves, at great risk to their life and health. *Supra*, p. 62. While these effects are an important part of the reality of the impact of the Hyde Restrictions, no one argues that the Congressional action can be justified in relation to a purpose of encouraging illegal or self-abortion or providing incentives for women to use their scarce food and rent money to purchase legal, necessary abortions. Where, as here, the evidence is that legislative action, in fact, fails to effectuate a constitutionally permissible purpose, those facts bear upon the question of constitutionality. *See e.g. Bellotti v. Baird,* 428 U.S. 132, 147, 179-80 (1976); *Carey v. Population Services International,* 431 U.S. 678 (White, J. concurring); *Eisenstadt v. Baird,* 405 U.S. 438 (1972) (White J. concurring); *Zablocki v. Redhail,* 434 U.S. 374 (1978).

The fourth impact of the exclusion of medically necessary abortions is to make it impossible for physicians to practice medicine in accordance with minimal professional standards. For the cancer patient for whom contraceptive pills are contraindicated, the physician must somehow decide whether it is preferable for the patient to run the very real risks of birth control pills or the risks of a health threatening pregnancy which cannot be terminated. *Supra,* p. 61, n.89. For the psychotic patient who, in order to preserve her sanity, requires drugs that may damage the fetus, the physician must somehow choose between real and substantial risks to the woman or to the fetus. The Hyde Amendment thus impermissibly forces doctors to weigh the health of the pregnant woman against the welfare of the fetus. This Court, in *Colautti v. Franklin*, observed that obligating physicians to "trade off" the potentially competing interests of a pregnant woman and a fetus "presents serious ethical and constitutional difficulties."439 U.S. at 400.

Severe burdens and penalties are imposed upon women and physicians by the withdrawal of Medicaid entitlement. These burdens and penalties are not constitutionally irrelevant simply because they are imposed in the context of a program providing benefits to the poor. While it is established that the mere fact that a classification denies essential services to the poor does not *ipso facto* call for closer constitutional scrutiny, it is equally clear that such classifications are not immunized from constitutional constraints. *See Califano v. Wescott*, 99 S. Ct. 2655 (1979), *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973).

Maher reaffirms that a "state-created obstacle need not be absolute to be impermissible," 432 U.S. at 473, and that the constitutionality of a policy limiting access to abortion "will depend [in part] upon its degree" (quoting *Bellotti v. Baird,* 428 U.S. 132, 149-50 [1976]). *Maher* also confirms that the pregnant woman is constitutionally protected "from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." 432 U.S. at 473-74. The Tenth

Circuit Court of Appeals states, in striking down a restriction on Medicaid funds for abortion:

> There is no direct interference in the case before us in the sense of a criminal prohibition, but the state should not be able to make a value judgment to fund necessary medical procedures in all instances except when an abortion is the procedure found necessary. All distinctions between abortions and other procedures are, of course, not prohibited, but the one before us is a distinction applied to a particular condition or diagnosis, and not to all others. This is a distinction which has no relation to health care for which the funds are to be expended. It is difficult to see how this can be placed in a category of a "value judgment" by the state. *D.R. v. Mitchell,* No. 78-1675, slip op. at 7 (March 10, 1980).

See also Reproductive Health Services v. Freeman, supra.

C. The Nature of the Group Burdened by the Riders Suggests the Need for Careful Constitutional Consideration.

Often at the very heart of the constitutional limitations which due process and equal protection guarantees place upon legislative action is the recognition that some groups are:

> saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *San Antonio School District v. Rodriguez,* 411 U.S. 1, 28 (1973).

The class affected here is, women who are poor, dependent upon welfare, and subject to health risks.

The Eighth Circuit, in a recent opinion which held exclusion of payments for medically necessary abortions unconstitutional, observed:

> [T]his is an area in which sensitive judicial review is particularly appropriate. The minority disadvantaged by Missouri's Medicaid exclusion is sex-specific and financially destitute. . . . These factors suggest "a special condition which tends seriously to curtail the operation of those political proceses ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *United States v. Carolene Products*, 304 U.S. 144, 152-53 n. 4. . . . Any strong deference to the legislative process seems especially inapt where the minority asserts not only the fundamental interest in deciding whether to bear a child, which was the case in *Maher,* but the additional interest in preserving one's own health. *Reproductive Health Services v. Freeman, supra,* slip op. at 29-30.

Congressional action singling out medically necessary abortions and denying Medicaid entitlement for this one medically necessary service raises issues similar to those considered in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). Mr. Justice Stewart, writing for the Court in *LaFleur* said:

> By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive mater-

> nity leave regulations can constitute a heavy burden on the exercise of . . . protected freedoms. Because public school maternity leave rules directly affect "one of the basic civil rights of man" . . . the Due Process Clause . . . requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty. 414 U.S. at 640.

See also Turner v. Department of Employment Security, 423 .U.S. 44 (1975) extending *LaFleur* to the protection of unemployment compensation.

Similarly in *Nashville Gas,* the Court unanimously condemned a policy requiring pregnant employees to take leaves of absence and to sacrifice accumulated seniority benefits. Mr. Justice Rehnquist, writing for the majority, said:

> [P]etitioner has not merely refused . . . to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer. The distinction between benefits and burdens is more than one of semantics. We held in *Gilbert* that § 703(a)(1) did not require that greater economic benefits be paid to one sex or the other "because of their differing roles in the scheme of existence," 429 U.S. at 139 n. 17. But that holding does not allow us to read § 703(a)(2) to permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of the different role. 434 U.S. at 142.

Similarly, here, while the refusal to expand Medicaid to include elective services needed only by women is

permissible under *Maher*, the denial of Medicaid for this single medically necessary service constitutes a penalty. The Congress has not "refused to extend to women a benefit" for elective non-therapeutic services that "men cannot and do not receive." Rather, by taking affirmative action to destroy entitlement for this one medically necessary service, Congress has "imposed on women a substantial burden that men need not suffer." [158]

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[158] This case presents issues very different than those considered by this Court in *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *General Electric v. Gilbert*, 429 U.S. 125 (1976). There the Court relied upon the fact that "*normal* pregnancy is an objectively identifiable physical condition with unique characteristics," 417 U.S. 496 n.20, which "is often a voluntarily undertaken and desired condition." 429 U.S. at 136. Pregnancy calling for a medically necessary abortion is, by definition, neither voluntary nor desired.

In *Aiello,* the Court found that the exclusion of benefits for normal childbirth was justified by California's legitimate interests in

> maintaining the self-supporting nature of its insurance program . . . distributing the available resources in such a way as to keep benefit payments at an adequate level from disabilities that are covered . . . [and] maintaining the contribution rate at a level that will not unduly burden participating employees. 417 U.S. 496.

Obviously these justifications are not applicable here. In *Califano v. Westcott*, 99 S. Ct. 2655, 2663 (1979), a unanimous Court held that even in the welfare context, "Congress may not legislate 'one step at a time' when that step is drawn along the line of gender. . . ." The invalidity of the Hyde restriction is even plainer since exclusion of a single necessary service from an otherwise comprehensive program to meet medical need is, for the women affected, more like a step down an elevator shaft than the incremental sort of step invoked by the traditional language. The fiscal realities render inappropriate any deference to legislative allocative discretion. *See* p. 130, n.161, *infra.*

An official policy denying funds for medically necessary abortions has an obvious, sex-specific impact. A sex-blind analysis of the issue embodies a special irony. Historically the law sanctioned restraints on women's rights, responsibilities and opportunities, by exaggerating the burdens and incapacities attending women's role as mother.[159] Now by adopting an affirmative policy that denies poor women the means to control reproduction, Congress imposes burdens which would make the stereotype a self-fulfilling prophecy for poor women.

D. No Legitimate Purpose is Served by the Hyde Restriction.

The final factor that must be considered in determining whether legislative action violates the constitutional guarantees of due process and equal protection is the public purpose the legislation is designed to service or the purposes that may, as a hypothetical matter, be served by it.

Maher holds that because the state has a legitimate interest in encouraging normal childbirth and protecting potential life, it is not constitutionally compelled to extend Medicaid funding to include elective abortions. 432 U.S. at 474. In the district court, HEW relied upon *Maher*, and characterized the Hyde restriction as furthering an "interest in encouraging childbirth;"[160]

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[159] *See Muller v. Oregon,* 208 U.S. 412 (1908); *Goesart v. Cleary,* 335 U.S. 464 (1948); *Hoyt v. Florida,* 368 U.S. 57 (1961). *Compare, for example, Reed v. Reed,* 404 U.S. 71 (1971); *Craig v. Boren,* 429 U.S. 190 (1976).

[160] *Defendant's Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction,* Aug. 2, 1977, R.64, p. 9. This earlier memo was adopted by and appended to *Defendant's Post Trial Memorandum of Points and Authorities,* Nov. 10, 1978, R.165, pp. 54-55.

before this Court in *Zbaraz,* HEW asserts that the Hyde restrictions reflect "the desire to encourage normal childbirth . . . ." Brief of the United States, p. 55.

The distinction is critical: only an interest in "normal" childbirth will suffice as a matter of law. Yet the medical evidence demonstrates, in exacting detail, that the denial of medically necessary abortions does not further an assumed governmental interest in encouraging normal childbirth. *Supra* pp. 13-50. Just as the Court consistently limited the decisions in *Beal* and *Maher* to "elective" or "non-therapeutic" abortions, the Court was also careful to characterize the state's legitimate interest in the limited terms of "encouraging *normal* childbirth." This limitation, built into the interest there asserted by the state, is consistent with minimal rationality and mandated if the state is to avoid the basic irrationality of denying payments where the result is to impair, perhaps irrevocably, a woman's health. *Beal* and *Maher* give no license to preferring childbirth at any cost, yet that is precisely what the Hyde exclusions in fact do.

The district court in *McRae v. Harris* read "*Beal*, *Maher*, and *Poelker* as cases in which there was no health care need for abortion." Slip op. at 311. The district court further found that in the course of treating a patient eligible for Medicaid, a physician will often make an

> appropriate medical judgment, for the preservation of the life or health of the mother," *Roe v. Wade*, 410 U.S. at 165, that abortion is medically necessary . . . . To deny the appropriate medical assistance to the patient in need of medical assist-

ance and remit her to a less appropriate medical course and abandonment of her fundamental right of choice, or else to resignation of Medicaid benefits, is not called for by *Maher v. Roe* and is forbidden by the principle it reaffirms. Slip op. at 312.

The government purposes served by the Hyde restrictions are hence critically different from those considered in *Maher*. In *Maher* and *Beal* state Medicaid officials, in the wake of *Roe v. Wade*, responded to the changed legal status of abortion by providing funding for abortion on the same basis as other Medicaid services, i.e., where the services were medically necessary. 432 U.S. 438, 445 n. 9 (1977). Here, by contrast, Congress acts affirmatively to eliminate Medicaid entitlement to medically necessary services. As Judge Dooling found, "the impact of the Hyde amendments is not to influence the pregnant woman toward normal childbirth, for that is not medically possible, but to frustrate her making, in consultation with her physician and for medical reasons," the choice whether to abort or to have a child. Slip op. at 311.

HEW now asserts a new interest in support of the Hyde restriction, "the desire to avoid spending tax revenues to support an activity that many taxpayers find morally repugnant." Brief of the United States, p. 55. Given the fiscal realities,[161] it is certainly not the interests of taxpayers, *qua* taxpayers, that supports the

[161] Mr. Justice Stevens correctly observed, in denying the state's application for a stay in *Williams v. Zbaraz*, that "it is less expensive for the State to pay the entire cost of abortion than it is for it to pay only its share of the costs associated with a full term pregnancy." 99 S.Ct. 2095, 2098 (1979).

government's affirmative action eliminating plaintiffs' Medicaid entitlement to medically necessary services. *Ex hypothesis*, whenever Congress acts it is because a majority of people, or as in this case, a highly mobilized minority, support the action taken.[162] But this "jusitification amounts to little more than an assertion that discrimination may be justified by a desire to discriminate." *Board of Engineers v. Flores de Otero*, 426 U.S. 572, 605 (1976). The premise of our constitution is that the power of the majority is limited, and that the Judicial branch has the sometimes difficult responsibility of protecting constitutional rights against the excesses of majoritarian expedience. *Marbury v. Madison*, 1 Cranch 137 (1803).

The government's assertion of the "moral interests" of taxpayers presumably refers to the fact that some people believe that human life begins at conception, and hence desire to prevent abortion as a form of infanticide.[163] The Hyde restrictions are justified as a

[162] For opinion surveys on attitudes toward abortion see slip op. at 33, 37, 166-68 and fn. 91.

[163] Other taxpayers may disapprove of sexual activity among the poor and believe that poor women should be forced to bear the consequences of sexual relations. This Court said in *Roe v. Wade*, "no court or commentator has taken the argument [that abortion may be denied as a means of discouraging sexual activity] seriously." 410 U.S. at 148. In *Eisenstadt v. Baird*, 405 U.S. 438, 448 (1972), the Court explained "It would be plainly unreasonable to assume that [the state] has prescribed pregnancy and the birth of an unwanted child as punishment for fornication."

The Amendments deny funds to the married and the unmarried alike, and hence it cannot be argued that they are designed to discourage extramarital sexual activity. If the purpose of the Amendments is to discourage sexual activity solely on the part of poor women, including those who are married, their constitutional invalidity is self-evident. These interests do not become stronger because they are asserted in the name of taxpayers.

form of symbolic statement. The statement is not that some taxpayers believe that abortion is wrong, but rather that abortion is so clearly wrong that Congress can insist that poor women conform their conduct to these moral views by destroying existing Medicaid entitlement.[164]

The government's assertion that the Hyde Amendments serve a purpose of accomodating the moral beiefs of some taxpayers is very close to its asserted purpose of protecting the fetus. This very issue was at the heart of *Roe v. Wade*. The Court found that the state, "by adopting one theory of life," may not "override the rights of the pregnant woman that are at stake." 410 U.S. at 162.

This Court made plain in *Wade*, 410 U.S. at 165, and reaffirmed in *Maher*, 432 U.S. at 472, that even at "the stage subsequent to viability, the state in promoting its interest in the potentiality of human life," may not create regulations which deny women abortions "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." The Court has carefully and firmly delineated these limits to governmental authority to protect potential human life. The Riders cannot be justified by this interest since they do not allow payments for abortions necessary to preserve the health of the woman at any stage

[164] To allow funding for medically necessary abortions, on the same terms as all other medically necessary services, does not imply governmental approval for abortion any more than governmental approval of people living in sin can be implied from the fact that the Constitution requires that otherwise qualified individuals be allowed to receive welfare whether or not they are married. *See e.g., New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619 (1973), striking a state law limiting welfare for both parents and children when the parents were unmarried.

of her pregnancy. If the government cannot demand that the woman's health be sacrificed or jeopardized to further the compelling interest of protecting potential life *after* the point of viability, it follows *a fortiori* that the government cannot rest upon its interst in protecting potential life at earlier stages of pregnancy.

As we demonstrate more fully, Facts, *supra,* § 9, abortion raises profound moral and religious questions. Yet one need not conclude that abortion is an aspect of religious choice protected by the First Amendment to assert that where, as here, moral and religious opinion is strong and sharply divided, the moral objections of some taxpayers do not justify affirmative governmental action denying entitlement to services essential to protect individual health. The asserted rationale sweeps too broadly.[165] The fact that the government asserts this as a justification for Congressional action denying Medicaid entitlement indicates recognition of the absurdity of the assertion that the government seeks to encourage "normal" childbirth by denying necessary medical services.

Obviously the Constitution affords wide latitude to those "charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. . . ." *Dandridge v. Williams*, 397 U.S. 471, 487 (1970). As the Court there noted, "conflicting claims of morality and intelligence" are raised by every choice whether to allocate funds to meet the undeniably brutal need of families who stay together or are deprived of a parent, families who work or those unable to do so, the young, the old, the dis-

[165] For example many citizens opposed miscegenation on strong moral and religious grounds. *See Loving v. Virginia,* 388 U.S. 1 (1967).

abled.[166] However, *this is not such a case*.[167] Abortion presents the only situation in our history, in which poor people ask that they be afforded a less costly benefit, and the government insists that they may only have one that is far more costly both in terms of the public fiscal cost and in terms of the sacrifice demanded of women's life and health.

E. The Actual Purpose of the Hyde Restriction is to Penalize the Exercise of Constitutional Rights.

After detailed and careful examination of the legislative history, the lower court found that:

> The debates make clear that the amendment was intended to prevent abortions, not shift their cost to others, and rested on the premise that the human fetus was a human life that should not be ended. Slip op. at 21.[168]

[166] *See e.g., Jefferson v. Hackney,* 406 U.S. 535 (1972); *Wyman v. Rothstein,* 398 U.S. 275 (1970); *Idaho Department of Employment v. Smith,* 434 U.S. 100 (1977); *Richardson v. Belcher,* 404 U.S. 78 (1971). The political branches have been afforded similar discretion in making the tax judgments that are often necessarily arbitrary. *Kahn v. Shevin*, 416 U.S. 351 (1974).

[167] Apart from fiscal constraints, "administrative convenience" provides the most common justification for allegedly discriminatory classifications in government benefits programs. All the evidence is that the Hyde standards, because they are foreign and incomprehensible to physicians, do not solve but rather *create* problems for Medicaid administrators. Facts, *supra,* § 6. Administrative convenience would dictate that abortion be treated like all other medical services and financed when, in the physician's judgment, it is medically necessary.

[168] This Court has held that, in these circumstances, "the mere recitation of a benign . . . purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Weisenfeld*, 420 U.S. 636, 648 (1975); *U.S. Department of Agriculture v. Moreno*, 413 U.S. at 534.

The denial of payments is precisely for the *purpose* of depriving women and their physicans of the constitutional freedom to choose medically necessary abortions. "If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' *United States v. Jackson,* 390 U.S. 570, 581 (1968)." *Shapiro v. Thompson,* 394 U.S. 618, 631 (1969).

This Court has consistently held that:

> if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

In *Moreno* the federal statutory provision denied food stamps to people who lived in households containing individuals who were not related by blood or marriage. The legislative history indicated that the actual purpose of the restriction was to deny food stamp benefits to "hippies" and "hippy communes."

The constitutional invalidity of the Hyde restrictions is more blatant than the claim accepted in *Moreno*, since the restriction there would have had an incidental effect that is legitimate, *i.e.*, saving public funds. Here the incidental effects are: required sacrifice of women's life and health, as well as increased public expenditures, and vast complication of Medicaid administration and medical practice. Further, here there is a firm constitutional base for the right to choose

abortion, while there the constitutional right of unrelated people to establish a household is, at best, uncertain.[169] *See also, Weinberger v. Salfi,* 422 U.S. 749, 772 (1975); *Board of Engineers v. Flores de Otero,* 426 U.S. at 605 (1976).

Because the Hyde restrictions are enacted, year after year, as riders to appropriations measures, the Congressional committees with responsibility for Medicaid have never considered the relation between the Hyde exclusion and the general statutory mandate of funding for all medically necessary services. This Court has observed that "[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role." *Village of Arlington Heights v. Metropolitan Housing Development,* 429 U.S. 252, 267 (1977). *See also, Whalen v. Roe,* 429 U.S. 589 (1977) in which this Court upheld a New York drug statute partly on the basis that it was "manifestly the product of an orderly and rational legislative decision." *Id.* at 597.

The stark reality is that the Hyde restriction serves no legitimate governmental interest, seriously undermines the Medicaid program's core purpose of promoting the health of poor people, and mandates the sacrifice of the lives and health of poor women, by denying entitlement to a medically necessary service.

[169] *Contrast Moore v. City of East Cleveland,* 431 U.S. 494 (1977) with *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974).

III.

THE HYDE EXCLUSION CREATES A CLASSIFICATION THAT VIOLATES THE FIFTH AMENDMENT'S GUARANTEE OF EQUAL PROTECTION OF THE LAW.

The Hyde exclusion imposes enormous burdens on the fundamental interests of a particularly vulnerable group and hence must be justified by important governmental interests. The right to choose whether to have an abortion or to bear a child is unquestionably fundamental. *Roe v. Wade*, 410 U.S. 147, 152-53 (1973); *Cleveland Board of Education v. LaFleur*, 414 U.S. at 640 (1974); *Zablocki v. Redhail*, 434 U.S. at 386 (1978). *Maher* recognizes that the right to choose abortion is fundamental, and affirms that the decision "signals no retreat from *Roe* or the cases applying it." *Maher v. Roe*, 432 U.S. 464, 475 (1977).

All of the factors that distinguish this case from *Maher* also dictate that the discriminatory classification created by the Hyde exclusions be judged by a standard more rigorous than that applied in *Maher*. When "statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972).[170] Even in cases involving no suspect classification or fundamental constitutionally protected right, this Court has required that:

[170] See also *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). ("[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.") *Zablocki v. Redhail*, 434 U.S. 374 (1978) (Powell concurring).

> In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719, 725 (1973) (Rehnquist, J.); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)(Black, J.); *Kramer v. Union Free School District*, 395 U.S. 621, 626 (1969); *Dandridge v. Williams*, 397 U.S. 471, 521 (1970) (Marshall dissenting).[171]

Consideration of each factor points to the constitutional infirmity of the discriminatory classification.

Furthermore, the classification is not reasonably related to any legitimate government purpose. In *Maher*, where the state did no more than refuse to expand Medicaid coverage to include elective abortion services for which there would otherwise be no statutory entitlement, this Court required that the state policy be "rationally related" to a "constitutionally permissible" purpose. 432 U.S. at 478. The Court demanded that a "reasonable basis" for the state's "strong and legitimate interest in encouraging normal childbirth." *Id.* at 478. Even in that very different context, this Court reaffirmed that once the government "decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations." *Id.* at 469-70. It is long settled that even where no fundamental rights or suspect classifications are involved, legislative classifications must be reasonably related to some legitimate purpose. *Carrington v. Rash*, 380 U.S. 89 (1965); *James v. Strange*, 407 U.S. 128 (1972); *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Douglas v. California*, 372 U.S. 353 (1963); *Cleveland Board of Education v. LaFleur*, *supra*, 414 U.S. at 653, n.2 (1974) (Powell, J., concurring in the result on grounds that even a non-suspect classification "must at least rationally serve some legitimate articulated or obvious state interest.")

[171] In *Vlandis v. Kline*, 412 U.S. 441, 458 (1973), Mr. Justice White observed, "it is clear that we employ not just one, or two but, as my Brother Marshall has so ably demonstrated, a 'spectrum of standards' in reviewing discrimination allegedly violative of the Equal Protection Clause," quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 98-99 (1973).

IV.

THE HYDE EXCLUSION PENALIZES VULNERABLE CITIZENS, FAILS TO MEET MINIMAL STANDARDS OF FUNDAMENTAL FAIRNESS AND HENCE DENIES DUE PROCESS OF LAW.

Mr. Justice Harlan once described the liberty protected by the Due Process Clause as a:

> rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. *Poe v. Ullman*, 367 U.S. 497, 543 (1961). See also *Roe v. Wade*, 410 U.S. 113, 169 (Stewart, J., concurring).

It is settled that the "liberty" protected by the Due Process Clause of the Fifth Amendment embraces more

than those freedoms expressly enumerated in the Bill of Rights. See *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923); *Zablocki v. Redhail*, *supra*; and *Cleveland Board of Education v. LaFleur*, *supra*. It is also settled that Due Process protects the right of the individual "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The constitutional protection of life and liberty shields the individual from arbitrary governmental action demanding sacrifice of life or health, *supra*, pp. 116-20, though it must be conceded that there are few cases considering the question because the government so rarely demands sacrifice of individual life and health, apart from situations of paramount national defense.

The Hyde restriction has resulted in the sacrifice of the right to choose whether to bear a child where pregnancy is medically contraindicated. It demands that poor pregnant women disregard their own wishes, the needs of their families, the advice of their physicians, and place their health and life in jeopardy. The denial of entitlement for medically necessary abortions forces women either to continue health-threatening pregnancies, to bear the substantial risks of illegal or self-abortions or to use meagre funds to procure legal abortions. The precise purpose of the restriction is to impose a burden upon a sex specific group for the exercise of a fundamental right. This does not meet minimal constitutional standards of fundamental fairness.

The liberty protected by the Due Process clause prohibits the accomplishment of even legitimate government goals by means which unnecessarily expose individuals to danger. Mr. Justice Stevens' simple analogy in *Carey v. Population Services International,* 431 U.S. 678 (1977) is applicable here. Even though he found that the state objective of deterring sexual conduct among teenagers was legitimate, the method chosen to accomplish that goal—proscribing contraceptives—was illegitimate because it imposed a significant detriment on the minors' health.

> Although the state may properly perform a teaching function, it seems to me that an attempt to persuade by inflicting harm on the listener is an unacceptable means of conveying a message that is otherwise legitimate. The propaganda technique used in this case significantly increases the risk of unwanted pregnancy and venereal disease. It is as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets. One need not posit a constitutional right to ride a motorcycle to characterize such a restriction as irrational and perverse.

Even as a regulation of behavior, such a statute would be defective. Assuming that the State could impose a uniform sanction upon young persons who risk self-inflicted harm by operating motorcycles, or by engaging in sexual activity, surely that sanction could not take the form of deliberately injuring the cyclist or infecting the promiscuous child. If such punishment may not be administered deliberately, after trial and a finding of guilt, it manifestly cannot be imposed by a legislature, indiscriminately and at random. This kind of govern-

> ment-mandated harm, is, in my judgment, appropriately characterized as a deprivation of liberty without due process of law. 431 U.S. at 715-16.

In *Zablocki v. Redhail*, at 394-395, Mr. Justice Stewart held that it violates due process to require poor people who seek to marry first to prove that they have met their support obligations to existing children. "To deny these people permission to marry penalizes them for failing to do that which they cannot do." *Id.* at 394. See also *Nashville Gas v. Satty*, and *Cleveland Board of Education v. LaFleur*. Similarly here, to affirmatively deny poor women funds for medically necessary abortions penalizes them for failure to do what is impossible. None of the named plaintiffs can aid the government in its asserted purpose of producing "normal" children. They cannot make themselves whole or healthy. The government, in denying their entitlement to medically necessary services, harshly penalizes them for their misfortune.

V.

THE HYDE AMENDMENT IS IMPERMISSIBLY VAGUE IN VIOLATION OF THE FIFTH AMENDMENT'S GUARANTEE OF DUE PROCESS.

The trial court held:

> The strangeness to medical thinking of "life endangerment" as the factor decisive of the use of a medical procedure is shown by the medical evidence, and is an added element relevant to the application of the rationality test. The meagre

> statistics on abortion since the Hyde Amendment bear out the view emerging from the medical evidence: the life endangerment test is so uncertain of meaning in terms of medical content that it operates to restrict the use of abortion procedure in Medicaid to the narrowest classes of cases, to crisis intervention. It seems to function to exclude many more cases than can be supposed to have been intended for exclusion because of the physicians' inability to divine what medical standards it implies. Slip op. at 322-323.

The Hyde Amendment "life endangering" standard is so vague that doctors are chilled from authorizing even those abortions that were intended to qualify for reimbursement, because of the realistic threat of federal investigation with criminal or civil sanctions for those certifications later administratively deemed unwarrantedly broad interpretations of the restriction. To avoid these sanctions, doctors cautiously interpret the ambiguous Hyde standard narrowly, with the result, as the trial court found, that Medicaid abortions are limited to the "narrowest classes of cases, to crisis intervention." Thus, the vagueness of the Hyde standard chills exercise of the fundamental right to abortion even in situations where Congress would consider Medicaid reimbursement necessary and appropriate. No governmental interest is furthered by that result.

The trial court found, upon ample and largely undisputed evidence, that "life endangering" is not a standard that doctors routinely use, and they do not know what it means. Slip op. at 91. The standard is vague on its face and as applied. For instance, how certain must the danger to life be? 90%? 75%? How imminent must

the danger be? Is a statistical increase in the *risk* of life endangerment sufficient, and if so, how substantial must that increase be? Is a woman's life endangered within the meaning of Hyde if the danger, though clear, could theoretically be controlled by costly alternatives, such as full-time hospital bed rest, which are not available to poor women? Or, is a reasonable likelihood that the woman's life would be shortened enough? In enacting an exception for severe and long-lasting physical health damage to the 1978 and 1979 Riders, Congress obviously did not intend that such adverse effects were within the meaning of life endangerment. Annex to slip op. at 236, 237.

Congress and HEW have not further defined the Hyde standard, and have issued no regulations that would answer these questions or clarify the ambiguities inherent in the standard. 42 C.F.R. § 50.304 (1978); *see* 43 Fed. Reg. 4570, 4574 (1978). Thus doctors must answer these questions for themselves, creating realistic risks of arbitrary and unequal application of the law, and of possible criminal sanctions if doctors guess wrong.[172]

The Medicaid program contains a comprehensive scheme of federal criminal sanctions for Medicaid fraud and abuse, 42 U.S.C. § 1396, enforceable against

[172] The highly polarized abortion debate is conducive to ideologically motivated, discriminatory prosecutions of doctors who perform abortions. The recent literature unfortunately abounds with incidents of attempts to use the criminal prosecution of doctors as a technique to inhibit abortion, even in the Medicaid context. Cf. *Orr v. Nebraska Department of Public Welfare*, No. 80-031 (D.Neb. Jan. 25, 1980) (Preliminary injunction against civil action or criminal prosecution of abortion provider based upon claims for Medicaid reimbursement). *Floyd v. Anders*, 440 F.Supp. 535 (D.S.C. 1977) (three-judge-court), *remanded*, 440 U.S. 445, March

both physicians and their patients.[173] In addition, the federal government requires states to pursue investigations and prosecutions of Medicaid fraud as a condition of participation in the Medicaid program. 42 C.F.R. § 455.12 *et seq*. (1979).[174]

HEW has made clear to physicians that it is reasonable for them to fear prosecutions for "fraudulent" cer-

5, 1979 (*per curiam*); *Commonwealth v. Edelin*, 359 N.E. 2d 4 (Mass. 1976); *State v. Munson*, 86 S.D. 663, 201 N.W.2d 123 (1972) (directed verdict for defendant); *Dr. Pablo Quiroga v. Medical Practice Board, et al.*, No. 77-20461-AA (Cir. Ct. for Cty. of Ingham, Mich., filed 1977). See also *Women's Right, Physician's Judgment: Commonwealth v. Edelin and a Physician's Criminal Liability for Fetal Manslaughter*, 4 Women's Rights Law Reporter 97 (1978).

[173] Under the federal statute, the making of a false statement by a physician or a recipient in an application for payment is a felony, punishable by imprisonment up to five years, or a fine of up to $25,000, or both, even if the Medicaid payment is never made. 42 U.S.C. § 1396h (a). The same section makes it a misdemeanor for a doctor to make an application which contains a false statement by a person other than the doctor. A physician convicted of an offense related to the provision of Medicaid services is automatically suspended from Medicaid practice by the Secretary for whatever period the Secretary "deems is appropriate". 42 U.S.C. § 1395. The Medicaid statute also contains a blanket prohibition of payment if the Secretary determines the provider has "knowingly and willfully made or caused to be made any false statement or representation of a material fact for use in an application for payment." 42 U.S.C § 1395.

[174] Under this regulation, state criminal penalties for fraud may be imposed on doctors. Although the Medicaid regulations place primary responsibility for discovering and prosecuting fraud on the state, the federal government retains the right to initiate federal prosecutions under Title XIX, (*see* fn. 173 *supra*), or under other titles of the U.S. Code, e.g.: 18 U.S.C. § 286 (conspiracy to obtain payment from the U.S. government on a false claim); § 287 (presenting a false claim); 18 U.S.C. § 1001 (concealment of a material fact or making a false statement to the government).

tifications under this ambiguous Hyde standard.[175] And HEW and Congress have repeatedly warned doctors that their Medicaid abortion certifications will be subjected to more rigorous scrutiny than any other Medicaid procedures. The 1977 Hyde Amendment specifically required that "the Secretary shall establish procedures to ensure that the provisions of this section are rigorously enforced." [176]

Of course a physician cannot be required to run the risk of a penalty for a "fraudulent" certification that a patient's life would be endangered if pregnancy were carried to term. Medicaid doctors are not required to serve their poor patients; they can inform patients that, notwithstanding the fact that the pregnancy poses health risks, they cannot provide the needed

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[175] In response to a plaintiff's inquiry concerning HEW's plans to monitor for fraud, the U.S. Attorney responded that ". . . we envision investigations of individual cases upon either direct or circumstantial evidence of fraud . . . circumstantial evidence would probably consist of the performance by a physician . . . of a significantly higher rate of certified abortions as compared to a 'normal' rate to be established on the basis of regional or nationwide experience under the Hyde Amendment." (Pl. Exh. 12/T. 933). Permitting a statistical inference of fraud is highly misleading since many abortions are done by specialist physicians and clinics (Teitze, T. 935); in many areas most abortions are performed at specific hospitals, e.g. the University of Michigan hospital (Eliot, T. 404); physicians who serve a high risk population, e.g. poor teenagers, will legitimately encounter higher than "average" numbers of life endangering pregnancies (Hofmann, T. 1282-89).

[176] The Secretary's comments on the January 26, 1978 implementing regulations concluded:

> It must be noted that any person who knowingly submits a falsified claim for Federal funds, or who aids or abets the submission of a falsified claim, may be subject to prosecution under section 1909 (a) of the Social Security Act or another applicable provision of the law. 43 Fed. Reg. 4832, 4842 (1978).

medical service unless sure of payment. This raises serious legal and ethical problems for the doctor. Or the doctor may perform the abortion free, an option not available to physicians who perform abortions only in hospitals, or whose patients need hospital abortions. Two plaintiff doctors testified that their hospitals would not approve admissions unless payment was assured by Medicaid or the patient. (Hodgson, T.49; Bingham, T.487-88.) Moreover, many Medicaid women will need second trimester abortions, usually performed only in a hospital. Slip op. at 76. (Romney, A.221-22.) The option of denying services which the patient seeks, and which the doctor believes are necessary, was also open to Doctors Franklin and Vuitch in *United States v. Vuitch*, 402 U.S. 62 (1971), and *Colautti v. Franklin*, 439 U.S. 379 (1979). This Court made no suggestion that the vagueness claims in their cases could be avoided on the ground that they could simply refuse to treat their patients. Given these facts, the trial court's conclusion that the "life endangering" standard is void for vagueness is not only consistent with, but compelled by, previous decisions of this Court. It is settled that statutes which abridge fundamental rights must be framed narrowly, and with precision; that they must provide fair notice of what they permit and proscribe; and that they must provide sufficient guidance to enforcement officials to prevent excessive discretion or abritrary and discriminatory enforcement. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 170 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 604 (1967); *Dombrowski v. Pfister*, 380 U.S. 479 (1965); *United States v. Harris*, 47 U. S. 612, (1954); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Connally v. General Construction Co.*, 269 U.S. 385

(1926). The Hyde standard is impermissibly vague under each of these tests.

In *United States v. Vuitch*, 402 U.S. 62 (1971) this Court upheld the District of Columbia criminal abortion statute which prohibited abortion unless "necessary for the preservation of the mother's life or health," by construing the statute to avoid the constitutional problem of vagueness. Adopting a lower court's construction of the same statute to permit abortions "for mental health reasons whether or not the patient had a previous history of mental defect," this Court observed:

> Certainly this construction accords with the general usage and modern understanding of the word "health," which includes psychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as the "[s]tate of being . . . sound in body [or] mind." Viewed in this light, the term "health" presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered. 402 U.S. at 72.

Similarly, in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) this Court held Missouri's definition of viability not impermissibly vague, but only because it allowed doctors the flexibility to exercise medical judgment:

> . . . we recognized in *Roe* that viability was a matter of medical judgment, skill and technical

> ability, and we *preserved the flexibility* of the term. Section 2(2) does the same. *Id.* at 64 (emphasis added).

In a concurring opinion, Justice Stewart, joined by Justice Powell, noted:

> While the physician may be punished for failing to issue a certification, he may not be punished for erroneously concluding that the fetus is not viable. There is thus little chance that a physician's professional decision to perform an abortion will be "chilled." *Id.* at 89.

In contrast, the evidence in *McRae* establishes, as the trial court found, that physicians' judgments have in fact been chilled by the vagueness of the Hyde standards, and the realistic possibility of criminal prosecution of doctors who erroneously conclude that a pregnancy is life endangering.

Colautti v. Franklin, 439 U.S. 379 (1979) also emphasized the uncertainties inherent in medical decision making, and the corresponding need for regulatory statutes to give doctors sufficient breadth to exercise their best medical judgments. Distinguishing *Vuitch* and *Bolton*, which upheld statutes against a vagueness challenge, this Court noted:

> The contested provisions in those cases had been interpreted to allow the physician to make his determination in light of all attendant circumstances—psychological and emotional as well as physical—that might be relevant to the well-being of the patient. The present statute does not afford broad discretion to the physician. Instead it condi-

tions potential criminal liability on confusing and ambiguous criteria. It therefore presents serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights.[177] *Id.* at 394.

[177] Prior to 1973 several courts struck down abortion statutes on vagueness grounds. In *Roe v. Wade*, 314 F. Supp. 1217 (D. Tex. 1970), *aff'd on other grounds*, 410 U.S. 113 (1973), the three-judge court which held invalid a Texas law prohibiting abortions except "for the purpose of saving the life of the mother," observed the statute's "grave and manifold uncertainties":

> How *likely* must death be? Must death be certain if the abortion is not performed? Is it enough that the woman could not undergo birth without an unascertainably higher possibility of death than would normally be the case? What if the woman threatened suicide if the abortion was not performed? . . . Is it sufficient if having a child will shorten the life of the woman by a number of years? (Emphasis in the original.) *Id.* at 1223.

In addition, the California Supreme Court invalidated that state's criminal abortion statute, which excepted from penalty only those abortions "necessary to preserve" the life "of the pregnant woman." *People v. Belous*, 71 Cal. 2d 954, 80 Cal. Reptr. 354, 458 P. 2d 194 (1969), *cert. denied*, 397 U.S. 915 (1970). The Court stressed the inherent ambiguity in the language and the various interpretations of it offered by the doctors.

Identical language was also struck down in Illinois in *Doe v. Scott*, 321 F. Supp. 1385 (N.D. Ill. 1971). The Court there found that the:

> practical effect is to make abortion unavailable to women unless there is a reasonable certainty that death will result from a continuation of pregnancy. *Id.* at 1389.

VI.

THE HYDE ADMENDMENTS ARE INVALID UNDER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT.

Congress recognized the necessary interrelationship between choice of medical service and religious and conscientious belief when it established the Medicaid program. Excepting an overriding public health justification, as in the case of contagious disease, 42 U.S.C. § 1396f prohibits compelling any form of medical service against a person's religious beliefs.

This provision protects a Jehovah's Witness' refusal to accept a blood transfusion and the concomitant necessity to fund alternative medical care. They protect the strictly observant Catholic's right to refuse artificial birth control as well as her right not to consider abortion. Until enactment of the Hyde Amendments, they protected equally the right of poor women to have a medically necessary abortion in accordance with the dictates of their faith and conscience.

The Hyde Amendments thus destroy not only the guarantee of comprehensive medical care for the poor, but also the universal guarantee of liberty of conscience. They condition entitlement to necessary health care on abandonment of religious and conscientious convictions that abortion is appropriate. Moreover, the free exercise of conscience is unqualifiedly guaranteed to those whose moral convictions preclude even entertaining the possibility of abortion. The riders thus deprive the program of the neutrality which was its goal

and which is constitutionally required by the Free Exercise Clause of the First Amendment. The preservation and maximization of religious liberty can only be accomplished by restoring the funding for medically necessary abortions excised by the riders.

In *Maher v. Roe*, this Court took pains to point out that different and more exacting standards govern the allocation of benefits where religious liberty guaranteed by the First Amendment is at stake. 432 U.S. at 474 n. 8. *Maher* did not consider the religious freedom dimensions of the abortion decision. Here, by contrast, the question was fully explored.

A. The Right to Make and Effectuate a Conscientious Decision about Abortion is Protected by the Free Exercise Clause of the First Amendment.

The right to make and effectuate a conscientious decision about abortion is encompassed within the First Amendment's concept of the free exercise of religion. As the district court properly recognized, the protection of the First Amendment embraces the exercise of religiously-formed conscience on a matter of such ultimate dimension. Slip op. at 326-28. The court wrote:

> A woman's conscientious decision, in consultation with her physician, to terminate her pregnancy because that is medically necessary to her health, is an exercise of the most fundamental of rights, nearly allied to her right to be, surely part of the liberty protected by the Fifth Amendment, doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the First Amendment. To deny necessary medical assistance for the lawful and medically necessary procedure of abortion is to violate the pregnant woman's First and Fifth Amendment rights. The irreconcilable conflict of deeply and widely held views on this issue of individual conscience excludes any legislative intervention except that which protects each individual's freedom of conscientious decision and conscientious nonparticipation. Slip op. at 328.

Although abortion is not a religious rite or ritual, it ranks as a paramount concern in all major religious traditions. For those of the anti-abortion faiths, abortion is a grave sin, interrupting God's creation and analogous to murder. In the pro-choice faiths, consideration of questions of the preservation of the health and well-being of existing life and of responsible parenthood likewise rank among the highest obligation of human beings toward one another and toward God.

The district court correctly recognized that the teachings of the pro-choice faiths "in the mainstream of the country's religious beliefs, and conduct conforming to them, exact the legislative tolerance that the First Amendment assures. *Wisconsin v. Yoder*." Slip op. at 327. The Free Exercise Clause protects not only the right to believe (or disbelieve), *Torcaso v. Watkins*, 367 U.S. 488 (1961), but also the right to practice one's beliefs, *i.e.*, to act in accordance with them. *McDaniel v. Paty*, 435 U.S. 618 (1978). The practice of religion encompasses apparently mundane activities or decisions about daily life which are "rooted in religious belief" rather than personal preference. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).

Significantly, the claim of conscientious objection to military service provided the opportunity for recognizing that the concept of religion embraces religiously grounded conscientious decision. "[F]reedom of conscience itself implies respect for an innate conviction of paramount duty." *United States v. Macintosh*, 283 U.S. 605, 633-34 (1931) (Hughes, J., dissenting).[177]

United States v. Seeger recognized as religious,[178] that belief "which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for exemption . . . ." 380 U.S. at 176.

Like conscientious objection to military service, the abortion decision demands the protection of the Free Exercise Clause. Pregnancy ineluctably requires imme-

[177] Judge Hand's formulation in *United States v. Kauten*, 133 F.2d 703, 708 (2d Cir. 1943), is frequently cited:

> Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow men and to his universe. . . . It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets. . . . [Conscientious objection] may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse.

[178] Though *Seeger* involved statutory interpretation of the conscientious objector exemption rather than a constitutional holding, the expansive interpretation was influenced by the concern for avoiding preferential treatment of the traditional believer as compared to the non-traditional one. *United States v. Seeger*, 380 U.S. at 176; *see*: *Welsh v. United States*, 398 U.S. 333 (1970) (Harlan J., concurring). In *Gillette v. United States*, 401 U.S. 437 (1971), the selective objector claim, found to be outside the statutory exemption, nonetheless triggered scrutiny under both the Free Exercise and Establishment Clauses.

diate, direct, intimate and profound confrontation with questions of life and death. The response may be immediate and instinctive or the result of a long, soul-searching process.[179] For some women, the fetus is inviolable, and conscience precludes consideration of abortion even at tremendous risk to life and health. For others, pregnancy requires balancing the potential of human life against questions of survival, purpose, lifelong responsibility, and ultimately the meaning of human existence and fulfillment. For these women, conscience may dictate the necessity of terminating an unwanted and health-threatening pregnancy.

The district court properly recognized that governmental action which interferes, directly or indirectly, in this religious and conscientious decisionmaking process—either by requiring abortion or coercing childbearing—violates the Free Exercise Clause. Slip op. at 328.

[179] In *United States v. Seeger*, this Court looked to contemporary definitions of religion which are particularly applicable to the matter of abortion. For example, a Vatican II draft declaration of the Church's relations with non-Christians states:

> Men expect from the various religions answers to the riddles of human condition. What is man? What is the meaning and purpose of our lives? What is the moral good and what is sin? What are death, judgment and retribution after death? 380 U.S. at 182.

Among those quoted who describe internally as well as externally derived belief was Dr. Paul Tillich who writes of God as the source of the affirmation of meaning within meaninglessness, 380 U.S. at 187, and explains:

> And if that word [God] has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern, *of what you take seriously without any reservation*. Perhaps, in order to do so, you must forget everything traditional that you have learned about God. . . . Tillich, The Shaking of the Foundations 57 (1948) (emphasis supplied).

B. The Hyde Amendments Impermissibly Burden the Free Exercise of Those Whose Religious and Conscientious Convictions Counsel Consideration of Abortion.

Because this case arises in the context of an existing structure of Medicaid entitlement, it presents only the issue of whether the government may "exact. . . surrender of. . . religious scruples," as a condition of access to that program. *Sherbert v. Verner*. 374 U.S. 398, 412 (1963) (Douglas, J., concurring). If the government had not undertaken to guarantee comprehensive medically necessary services to the poor, the absence of funding for medically necessary abortions would not raise First Amendment questions. The impermissible and discriminatory impact on free exercise arises because the government has undertaken to provide for the medical needs of indigent pregnant women and withdrawn one service, abortion, from the spectrum of services funded.

Unlike *Sherbert*, this case does not involve a claim that special treatment is constitutionally required to accommodate religious practice. *cf. Sherbert v. Verner*, 374 U.S. at 422 (Harlan, J., dissenting). Congress has already acted to guarantee "an atmosphere of hospitality and accommodation to individual belief and disbelief," *Sherbert v. Verner*, 374 U.S. at 415-16 (Stewart, J., concurring), by protecting religious liberty against coercion stemming from the provision of health services under the Medicaid program. Plaintiffs therefore do not seek exemption from restrictions generally applied to Medicaid recipients, but ask only that they be afforded the right, specifically guaranteed all others, to choose in accordance with the dictates of their conscience the medically appropriate treatment.

1. The Hyde Amendments Severely Burden Religious and Conscientious Determinations Regarding Childbearing.

Following this Court's indication in *Maher*, 432 U.S. at 474 n. 8, that restrictions on welfare benefits which burden free exercise draw special scrutiny, the district court properly concluded that the withdrawal of funding for medically necessary abortions impermissibly coerces childbirth in situations "undeniably at odds with fundamental tenets of their religious beliefs." *Wisconsin v. Yoder*, 406 U.S. at 218; slip op. at 326-28.[180] *Maher* adverted to the principle firmly established in *Sherbert v. Verner*, that even a facially neutral eligibility requirement must give way if it pressures plaintiff to forego abandonment of religious practice:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Government imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. 374 U.S. at 404.

To retain their entitlement to health care for pregnancy, Medicaid eligible women must forego their religious and conscientious determination whether to

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[180] *See* Facts *supra*, §9(b).

continue a pregnancy and submit to the state's determination that childbearing, even if health-endangering, is the required response to pregnancy.

Once government has voluntarily undertaken to provide public benefits, it cannot place conditions on them that exact surrender of religious scruples. *Sherbert v. Verner*, 374 U.S. at 405. The government may not use denial of a public benefit to achieve what it cannot command directly. *Elrod v. Burns*, 427 U.S. 347, 361 (1976); *Speiser v. Randall*, 357 U.S. 513 (1958). *Sherbert* squarely rejected the contention that the denial of benefits is constitutionally innocuous where it does not involve criminal sanctions and operates indirectly to burden religious exercise. 374 U.S. at 403-04.[181] "[T]o condition the availability of benefits upon . . . [a woman's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Sherbert*, 374 U.S. at 406.

The pressures created by the withdrawal of Medicaid funds for abortion under the Hyde Amendments im-

[181] Plaintiffs-appellees have already discussed the inapplicability to this case of the distinction between penalty and deterrent analysis suggested in footnote 8 in *Maher*. Moreover, footnote 8 cannot be read to apply this distinction to impediments to free exercise without undoing the core principle of the First Amendment that rules which directly or indirectly operate as prior restraints or have a deterrent effect on the exercise of expressional freedoms are constitutionally suspect. *See*, e.g., *NAACP v. Alabama*, 357 U.S. 459 (1958); *Speiser v. Randall*, 357 U.S. 513 (1958); *Murdock v. Pennsylvania*, 319 U.S. 105, 112-14 (1943). Indeed, one year before *Maher*, the Court reaffirmed the principle of *Sherbert* that invalidates "conditions on public benefits, in the form of jobs or otherwise, which dampen the exercise generally of First Amendment rights, however slight the inducement of the individual to foresake those rights. *Elrod v. Burns*, 427 U.S. at 358 n. 11 (1976).

pose a greater burden on religious exercise than found in *Sherbert*. At stake in *Sherbert* was up to twenty-two weeks of worship, with the loss of benefits reduceable to a monetary sum. At stake here is an irrevocable decision with life-long and life-threatening implications. Many women will be discouraged from conscientious decision or completely precluded from acting in accordance with the tenets of their faith.

To resist the Hyde Amendments' pressure by submitting to illegal abortion or delaying long enough to scrape together the funds for a legal one, poor women are severely taxed, not simply in monetary terms, but more importantly in terms of risk to their health and lives. Denial of funding thus creates a far greater burden on religious exercise than police power regulations that operate not to preclude religious practice but rather make it "more expensive." *See*: *Braunfeld v. Brown*, 366 U.S. 599 (1961).

In the area of the free exercise of religion, the Court has traditionally evidenced particular concern that otherwise unobjectionable governmental action can unduly burden the rights of the poor. *Sherbert v. Verner*; *Follett v. Town of McCormick*, 321 U.S. 573, 576 (1944). In *Murdock v. Pennsylvania*, the Court precluded application of a license tax to colporteurs because it restrains in advance the consititutional liberties of press and religion and inevitably tends to suppress their exercise particularly . . . for "all those who do not have a full purse." 310 U.S. 105 at 112. In the context of an essential public assistance program, forcing a woman to choose between foregoing her religious precepts or her entitlement to necessary health care can become a new device for the suppression of

religious liberty. *See: Murdock v. Pennsylvania*, 319 U.S. at 115.

2. The Hyde Amendments Discriminatorily Burden Women For Whom Abortion Is a Decision of Conscience.

The burdening or religious freedom by the excision of funding for medically necessary abortion is aggravated by religious discrimination. Medicaid-eligible women who adhere to the anti-abortion faiths suffer no impediment in the exercise of conscience. Those of the pro-choice persuasion are hindered or precluded, however, in the exercise of their religious and conscientious scruples. The Hyde Amendments have destroyed the Medicaid program's orginally neutral accommodation of religious and conscientious decisions concerning medical care in general and childbearing in particular.

This case thus involves the "constitutionally imposed 'government obligation of neutrality' originating in the Establishment and Freedom of Religion clauses of the First Amendment" distinguished in *Maher*, 432 U.S. 474 n. 8.(quoting *Sherbert v. Verner*, 374 U.S. at 409). Neutrality forbids governmental exclusion of "the members of any . . . faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." *Everson v. Board of Education*, 330 U.S. 1, 16 (1947) (emphasis in original). Even viewing the Hyde Amendment as a neutral, secular restriction, the religious discrimination it effects is subject to constitutional scrutiny. The free exercise clause "prohibits misuse of secular governmental programs 'to impede the observance of one or all religions or to discriminate invidiously between religions . . . even though the burden may be characterized as being only indirect.' *Braunfeld v. Brown*, 366 U.S. at 607." *Gillette v. United States*, 401 U.S. at 462 (1971).

Indeed, discriminatory allocations of public benefits or "privileges" are most strictly scrutinized under the First Amendment. This principle was established in the early speech cases involving access to public property. Thus, even before this Court recognized the First Amendment right to use the public parks and streets, it held discriminatory provision of access unconstitutional. *See, e.g., Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268, 272-73 (1951). The requirement of neutrality is strict where the free exercise of religion is at issue. *See: Walz v. Tax Commission,* 397 U.S. 664 (1970).

Noting that emergency labor laws exempted those who were "conscientiously opposed to Sunday work," *Sherbert* found the "unconstitutionality of the disqualification . . . compounded by . . . religious discrimination. . . ." 374 U.S. at 406. Likewise, the burden on conscientious decisionmaking is compounded here because the Hyde Amendments destroy the neutrality central to the original statutory scheme and required by the First Amendment. Equal treatment of the woman whose conscience dictates abortion rather than childbirth requires that the riders be invalidated. *United States v. Seeger*, 380 U.S. 163 (1965); *Welsh v. United States*, 398 U.S. 333 (1970).[182]

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[182] Forty-two states recognize the right to refuse participation in abortion. Alaska Stat. § 18.16.010(a) (Supp. 1979); Ariz. Stat. Ann. § 36-2151 (1974); Ark. Stat. Ann. § 41-2560 (1948, 1977); Cal. Health and Safety Code §§ 25955—25955.3 (West Supp. 1979); Colo. Rev. Stat. § 18-6-104 (1978); Del. Code Ann. tit.24, § 1791 (1975); Ga. Code Ann. § 26-1202(e) (1978); Haw. Rev. Stat. § 453-16(d) (1976); Idaho Code § 18-612 (1979); Ill. Rev. Stat. ch. 91 § 201 (1973); Ill. Ann. Stat. ch. 38, § 81-16, -33 (Smith-Hurd 1977); Iowa Code Ann. § 146.1-.2 (West Supp. 1979); Kan. Stat. §§ 65-443 to -444 (Supp. 1979); Ky. Rev. Stat. ch. 311. 800—.810

C. The Hyde Amendment Must Be Invalidated Because There Is No Substantial Purpose Justifying the Discriminatory Burden On The Abortion Decision.

Whether viewed as a burden on the free exercise of religion or as a violation of religious neutrality, the Hyde Amendments must be subject to strict scrutiny. In *McDaniel v. Paty*, the Court reaffirmed the standard

(1972, 1977); La. Rev. Stat. Ann. tit. 40, §§ 1299.31-.34 (West Supp. 1979); Me. Rev. Stat. Ann. tit. 22, § 1592 (Supp. 1979); Md. Code Ann. art. 43, § 556E (Supp. 1979); Mass. Ann. Laws ch. 112 § 121 (Michie/Law Co-op Supp. 1980); Mich. Comp. Law Ann. §§ 333.20182—.20184 (1978); Minn. Stat. Ann. §§ 145.414, .42, .925 (West Supp. 1979); Mo. Ann. Stat. ch. 197.032 (Vernon Supp. 1980); Mont. Rev. Codes Ann. tit. 94-5-620 (1977); Neb. Rev. Stat. §§ 28-4,156 to 160 (1975); Nev. Rev. Stat. § 632.475 (1977); N.J. Stat. Ann. tit. 2A:65A-1 to 2 (West Supp. 1979); N.M. Stat. Ann. § 30-5-2 (1978); N.Y. Civ. Rights Law § 79-i (McKinney 1976); N.C. Gen. Stat. § 14-45.1(f) (Supp. 1979); N.D. Cent. Code § 14-02.1-03(3) (Supp. 1979); Ohio Rev. Code Ann. § 4731.91 (Page 1977); Okla. Stat. Ann. tit. 63, § 1-741 (West Supp. 1979); Or. Rev. Stat. § 435.485 (1977); Pa. Cons. Stat. Ann. tit. 43 § 955.2 (Purdon Supp. 1979); R.I. Gen. Laws § 23-17-11 (1979); S.C. Code § 44-41-50 (1976); S.D. Cod. Laws § 34-23A-12 to -14 (1977); Tenn. Code Ann. § 39-304 to -305 (1975); Rev. Tex. Civil Stat. Ann. art 4512.7 (Vernon Supp. 1979); Utah Code Ann. § 76-7-306 (1978); Va. Code § 18.2-75 (1975); Wash. Rev. Code Ann. § 9.020.080 (1977); Wisc. Stat. Ann. § 140.42 (West 1974); and Wyo. Stat. Ann. § 35-6-106.

Federal law precludes conditioning the receipt of federal funds on the provision of abortion services. 42 U.S.C. §§ 300a-7-8, and several cases have recognized a right in private hospitals to refuse them. *Wolfe v. Schroering*, 541 F.2d 523, 527 (6th Cir. 1976); *Cf.*: *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974); *Taylor v. St. Vincent's Hospital*, 523 F.2d 75, 77 (4th Cir. 1975) *cert. denied*, 424 U.S. 948 (1976) (denominational hospital may refuse sterilization). In the Title VII context, the I.R.S. was required to accommodate an employee whose conscience precluded him from carrying out work which would result in the provision of abortion services. *Haring v. Blumenthal*, 471. F.2d 1172 (D.D.C. 1979).

of review applied in *Sherbert* and *Yoder* that disqualifications or penalties based on religiously grounded conduct can be sustained "only [by] those interests of the highest order and those not otherwise served." 435 U.S. at 628. Furthermore, the state interests in regulation must be based upon "some substantial threat to public safety, peace or order." *Sherbert v. Verner*, 374 U.S. at 403; *see, e.g., Reynolds v. United States*, 98 U.S. 145 (1878); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Prince v. Massachusetts*, 321 U.S. 158 (1944). The court below correctly applied these standards in invalidating the Hyde Amendment's withdrawal of abortion funding from the Medicaid program.

Here there is no interest,[183] let alone one of paramount importance, which overrides plaintiffs-appellees' free exercise claim, *see Yoder v. Wisconsin*; *compare Gillette v. Unites States*, since they seek only to have reimbursement to do an act which, like worship in *Sherbert*, is completely legal and constitutionally protected.

While bare legislative desire to deter the exercise of a fundamental right is not legitimate in any context, *supra*, Section II-E, it is doubly impermissible in the context of the First Amendment. This Court has repeatedly made clear that mere disapproval of the content of conscientious exercise is an impermissible basis for restraint. *See, e.g., Fowler v. Rhode Island,* 345

[183] Supra, pp. 128-136. In particular, the lower court found "There is no national commitment to unwanted children. Existing law encourages family planning, it does not foster unwanted pregnancy and unwanted childbirth. That is very particularly true with respect to teenage women, and, especially, women seventeen years of age and under." Slip op. at 166.

U.S. at 69-70; *Niemotko v. Maryland*, 340 U.S. at 272-73; *Murdock v. Pennsylvnia*, 319 U.S. at 116. That the riders are predicated on a moral valuation of fetal life not as potential but as actual human life is clear. Slip op. at 21. Even if this were not a religious judgment, *infra* Section VII, it is one which this Court correctly viewed as beyond the competence of the state in *Roe v. Wade*, 410 U.S. at 162. Moreover, under the Free Exercise Clause, the state cannot restrict abortion simply because it prefers the moral valuation of fetal and existing human life shared by the anti-choice forces to that held by those who consider abortion, in certain circumstances, to be a moral necessity or an affirmative act of faith. To be legitimate, the legislative purpose must serve some important and concrete public interest independent of disapprobation of the conscientious position. *See e.g., Gillette v. United States,* 401 U.S. at 437.[184]

[184] Describing the taxpayer's interest in withdrawing funding for abortion as "conscientious" adds no weight to the state interest asserted. Taxpayers have no First Amendment right to withhold tax payments because of deeply held religious or moral opposition: "The fact that some persons may object on religious grounds to some of the things that the Government does is not a basis upon which they can claim a constitutional right not to pay a part of the tax." *Autenreith v. Gullen*, 418 F.2d 586, 588 (9th Cir.), *cert. denied* 397 U.S. 1036 (1969). Indeed, even the Roman Catholic Church does not claim a free exercise right to withhold taxes for abortion, *supra* p. 71. Although Congress is not without power to legislate based on conscientious convictions that are widely shared, the district court properly recognized that a difference of opinion on a matter of conscience cannot override the conscientious claim of the individual whose practice is directly affected. Slip op. at 328. Thus, the attenuated claim of the taxpayer cannot outweigh the claim of indigent pregnant women to necessary medical services in accordance with their religiously-based conscientious decision. *Compare, e.g., United States v. Seeger*, 380 U.S. 163.

The riders serve no such interest. They are directed not to conduct within the regulatory power of the state, but rather to the suppression of dissident belief. As an effort to coerce conformity to the anti-abortion viewpoint, the riders are beyond the power of the state. As the Court recognized in *West Virginia State Board of Education v. Barnette*:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime and *particular plans for saving souls*. . . . Those who begin the coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
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> . . . .
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> [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order. If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or *force citizens to confess by word or act their faith therein.*

319 U.S. 624, 641-42 (emphasis added).

Judge Dooling simply restated the teachings of *Barnette* and *Roe v. Wade* when he wrote that "the

irreconcilable conflict of deeply and widely held views on this issue of individual conscience excludes any legislative intervention except that which protects each individual's freedom of conscientious decision and conscientious non-participation." Slip op. at 328.

For all these reasons, the Hyde Amendments must be invalidated as an impermissible and discriminatory interference with the religious and conscientious rights of poor women.

VII.

THE HYDE AMENDMENTS VIOLATE THE FIRST AMENDMENT'S PROHIBITION ON LAWS RESPECTING AN ESTABLISHMENT OF RELIGION.

The undisputed purpose of the Hyde Amendments is to restrict abortion as much as possible, on the belief that abortion, at any stage of gestation, is taking human life, tantamount to murder.

The Hyde Amendments have no preamble stating that they are designed to prevent the sin of abortion and bring civil law into conformity with God's law. Nor did the law, invalidated in *Epperson v. Arkansas*, 393 U.S. 97 (1969), prohibiting the teaching of evolution in the public school, explicitly state its religious purpose. Here, as in *Epperson*, this Court must look beyond the face of the statute. *Id.* at 108-09. The legislative history of the Hyde Amendments and their historical and social context make unmistakeable their religiosity.

This case is heir to *Epperson* in several respects. There, in response to attempts to liberalize the school

curriculum, "Scopes" laws were enacted withdrawing from the curriculum one subject abhorrent to a powerful religious constituency. Here, in response to the liberalization of abortion laws, the Hyde Amendments have been enacted withdrawing, from a broad medical assistance program, one medical service abhorrent to a powerful religious minority.

As in *Epperson*, the Hyde Amendments enact a distinctly religious belief in response to intense pressure from a religiously based and motivated constituency. The riders likewise reflect distinctively regious fervor. The fundamentalist movement behind the "Scopes" laws viewed its enemies as "blasphemers" and "anti-Christian."[185] Today, the so-called "right-to-life" movement views supporters of the abortion right as "murderers" and "anti-Christians." Religious mobilization and epithet unquestionably enjoy the full protection of the First Amendment. Here, however, as in *Epperson*, they must be examined as indicators of the impermissibly religious nature of the resulting legislation.

There is one important difference from *Epperson*. By the time *Epperson* was decided, the religious mobilization and fervor that had brought the "Scopes" law into existence had long since subsided.[186] The law had become a relic and the political tensions which arise whenever the religion clauses are in issue had been alleviated. By contrast, the growing divisiveness over the abortion issue is presently tearing this country

[185] *Epperson*, 393 U.S. at 107-08 n. 15,16.

[186] What had been viewed as non-sectarian in 1928 was recognized as sectarian 40 years later. Compare *Epperson* with *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927).

apart and "strains. . . [the] political system to the breaking point." *Walz v. Tax Commission of the City of New York*, 379 U.S. 664, 694 (1970) (Harlan, J. concurring).

This Court has formulated a tripartite test to determine whether or not a law establishes religion: "to pass muster under the Establishment Clause the law in question first must reflect a clearly secular purpose . . . second . . . have a primary effect that neither advances not inhibits religion . . . and third . . . avoid excessive government entanglement with religion. *Committee for Public Education v. Nyquist*, 413 U.S. 756, 773 (1973). Although the district court's extensive findings of fact fully substantiate the Establishment Clause claim, *see* Facts, *supra,* §§9, 10, 11, 12, the court failed properly to apply the principles settled in this Court. Application of these criteria to the Hyde Amendments dictate their invalidation under the First Amendment.

A. The Hyde Amendments Have No Clear Secular Purpose.

In Establishment Clause analysis, the Court deals with the actual purpose of legislation, not with hypothetical ones.[187] Given the inevitable, subtle and sometimes dangerous intertwining of secular and religious considerations, the operative purpose may not be just arguably secular; it must be clearly so.[188]

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[187] *See: School District of Abington v. Schempp*, 374 U.S. 203, 222-23 (1963); *Epperson v. Arkansas*, 393 U.S. 97, 107-09 (1968); *McGowan v. Maryland*, 366 U.S. 420, 431-45 (1961); *McDaniel v. Paty*, 435 U.S. 618, n. 9. (Brennan, J. concurring).

[188] See, e.g., *Everson v. Board of Education*, 330 U.S. 1, 7 (1947); *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 672 (1970) (Brennan, J., concurring). In most cases, the secular purpose was specifically set forth in legislative findings or in a preamble to the statute. *See*, e.g., *Board of Education v. Allen*, 392 U.S. 236, 239 n. 2 (1968); *Tilton v. Richardson*, 403 U.S. 672, 678 (1971); *Lemon v. Kurtzman*, 403 U.S. 602, 607, 609 (1971); *Committee* for Public Education v. Nyquist, 413 U.S. 756, 763-66 (1973); *Meek v. Pittenger*, 421 U.S. 349, 352 n. 2 (1975); *Wolman v. Walter*, 433 U.S. 229 n. 5 (1977).

Where, as in the parochial school aid context, religious and secular purposes can easily be distinguished analytically, this Court's concern is to assure that they can be disentangled in practice. This case, however, presents a threshold question of whether legislation that promotes the belief that the human fetus is a human life is impermissibly religious.[189] Whether a particular belief is religious requires consideration of empirical fact in light of the purpose of the First Amendment. The question here is, therefore, whether the belief that a fetus is human life is, in the historical and social context of our time, religious in character, and whether enactment of this belief in the form of the Hyde Amendment threatens intolerance, oppression and sectarian divisiveness against which the Establishment Clause stands guard.

The decisions of this Court instruct that the determination whether a given belief is impermissibly religious requires consideration of a number of factors. These are whether the belief is presently rooted in distinctively religious teaching, whether it is nonetheless a belief which is widely shared, whether the con-

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[189] There is no question that a law which sponsors, advances or imposes religion violates the Establishment Clause every bit as much as one which provides material assistance to religious institutions. *Epperson v. Arkansas*, 393 U.S. 97 (1968); *School District of Abington v. Schempp* 374 U.S. 203 (1963); *McGowan v. Maryland*, 366 U.S. 420 (1961)

stituency and advocacy for the law are identifiably religious in character or reflect distinct secular concerns, and whether institutional religion plays a predominant role in the effort to enact the particular belief into law. No single factor makes a law impermissibly religious.[190] *Epperson v. Arkansas*, 393 U.S. at 97; *School District of Abington v. Schempp*, 374 U.S. at 203; *Engel v. Vitale*, 370 U.S. at 431; *McGowan v. Maryland*, 366 U.S. at 420.

The district court found that the Hyde Amendments were enacted to prevent as many abortions as possible. They seek to implement the belief that actual, full and inviolable human life begins at conception. Slip op. at 273-74.[191] This belief is distinctly religious in our society. The riders' proponents contend, however, that the belief that human life begins at conception reflects secular as well as religious morality. Slip op. at 32.

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[190] In particular, although the dominance of institutional religion in the effort to enact a particular law is a relevant factor in Establishment Clause analysis, it is never alone sufficient to render a law impermissible.

[191] There is no contention here that the Hyde Amendments were enacted to advance distinctly secular concerns to encourage normal childbirth, or protect potential human life. No one even argued that the riders would save money. Indeed, fiscal conservatism was abandoned where legislators saw "human life" at stake. Similarly, no one seriously argued that the riders served any health interest. Indeed, organizations and programs concerned about maternal and child health opposed the abortion riders. For example, the statements from the American Medical Association and the American College of Obstretricians and Gynecologists are reported at Cong. Rec. S13671 (8/4/77). Recommendations of the American Academy of Child Psychology Pl. Exh. 169; A. 286; HEW, Initiative to Address Adolescent Pregnancy and Related Issues (Schuck Report), Pl. Exh. 244, (*See* Facts, *supra*, § 5f.)

It is clear that the view that abortion is tantamount to murder is "rooted firmly . . . in belief in God's will, in God as the author of life and in God's concern with humankind." Slip op. at 239. It is, as the district court found, "beside the point that reasonable men, without any knowledge of God or of his existence, would evolve the same principles by right reasoning alone" because "the moral principle, once determined by right reasoning is recognized as the will of God." Slip op. at 239-40. Scientific evidence is seen merely to confirm, not establish, the belief that the fetus is a human life from conception. Thus, the obligation to oppose abortion, despite reference to rational analysis or biological learning, is "seen nonetheless as religiously imposed." Slip op. at 229; *see* also, slip op. at 175-78.

Because they enact the belief that the fetus is an actual human life from conception, the Hyde Amendments are "beyond legitimate legislative concern." They intrude into "the specific but comprehensive area of human conduct: man's belief or disbelief in the verity of some transcendental idea . . ." *McGowan v. Maryland*, 366 U.S. at 466 (1961) (Frankfurter, J., concurring); *School District of Abington v. Schempp*, 374 U.S. at 244-45 (Brennan, J., concurring); *United States v. Ballard*, 322 U.S. 78, 86-87 (1944). "The realm of religion . . . is where knowledge leaves off, and where faith begins, and it never has needed the arm of the state for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve." *Wolman v. Walter*, 433 U.S. at 264 (Stevens, J. concurring and dissenting, quoting Clarence Darrow, Tr. of Oral Arg. at 7, *Scopes v. State*.

The "Scopes" law struck down in *Epperson* enacted a preference for the theory of divine creation of the world; the Hyde Amendments, premised on belief that human life begins at fertilization, are likewise based on a particular religious view of the divine creation of humanity.

The fact that a rule of law coincides with a religious tenet does not alone render it impermissible. When originally religious values are widely accepted by social consensus and where they serve the ends of civil governance (such as injunctions against murder or the benefits of a day of rest) they become a part of the secular fabric of society. *School District of Abington v. Schempp*, 374 U.S. at 264 (Brennan, J., concurring); *McGowan v. Maryland*, 366 U.S. at 445.

In *McGowan v. Maryland*, the Court upheld Sunday closing laws because they no longer reflected their originally religious purpose and had accrued independent *secular* purposes and a clearly independent secular constituency over time. The opinions recognize that society's contemporary concern with the physical and mental well-being of the workforce made a day off mandatory and that the predominant secular support for the law emphasized the importance of a universal day of rest to permit families to be together. 366 U.S. at 431-35, 470-505 (Frankfurter, J., concurring). Thus, the laws reflected a "widely felt present day need" and a "tradition which has persisted despite the disappearance of the original reasons or the decline in the part played by religious institutions in the social structure." *Id.* at 497, 504.

In *McGowan*, however, history revealed the secularization of the originally religious laws. Here, the con-

verse is true. Laws restricting abortion which historically served a panoply of secular concerns,[192] are today the product of a single, religious concern for the life of the fetus.

The belief in fetal personhood is primarily and overwhelmingly identified with one segment of religious teaching[193] and is emphatically rejected by the major Jewish and Protestant denominations "in the mainstream of the country's religious beliefs." Slip op. at 327. This division among religious faiths, on a matter which is so rooted in religious concepts, deprives the law of any claim to a secular, moral concern such as underlies the universally shared condemnation of murder.[194] This division is particularly significant as well because it breeds the sectarian strife which the no-establishment clause is designed to avoid (*infra*, section VII, B, C).

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[192] *See: Roe v. Wade*, 410 U.S. at 148-50, and sources cited therein. Mr. Justice Blackmun, writing for the Court, identifies three justifications supporting the criminal abortion laws of the nineteenth century: Victorian social concern to discourage illicit sexual conduct; protection of the pregnant women from then extremely hazardous medical procedures; and finally, in a distinctly tertiary role, protection of "prenatal life." *See also:* Mohr, *Abortion in America*, (1978); Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* (1976).

[193] *See e.g.*, school aid cases where the Court looked to the degree to which a particular law provided benefits primarily to religious schools rather than to non-sectarian private schools. *Committee for Public Education v. Nyquist. See, Walz v. Tax Commission*, 397 U.S. 664, 687-89 (Brennan, J., concurring).

[194] Even if a religious belief is shared by a majority, *e.g.*, *Epperson v. Arkansas*, or a particular practice is popularly viewed as non-sectarian, *Engel v. Vitale*, it can nonetheless be impermissibly religious under the Establishment Clause.

No cacophony of distinct secular institutional voices and concerns is heard in the forces that are pressing the view that the fetus is actual human life from the moment of conception. As the district court found, the anti-abortion churches, most significantly the Roman Catholic Church, are the major and practically exclusive institutional voices supporting these restrictions.

Even where there is substantial support for a law from non-ecclesiastical leaders and institutions, the Court looks to see whether the rationales put forward nonetheless have a significant religious component, even if non-sectarian. *School District of Abington v. Schempp*, 374 U.S. at 203, 270, 271 (Brennan, J., concurring.)[195] *See Illinois ex rel. McCollum v. Board of Education,* 333 U.S. 203, 228 (1948) (Frankfurter, J., concurring).

Here, the absence of clearly secular advocacy in the "right to life" movement for the abortion restrictions is decisive. Its constituency, support and orientation are largely religious and, more importantly, it asserts no independent secular justification for the evils of abortion. Where legislation rooted in sectarian religious beliefs not widely shared is claimed to serve a secular purpose, and is supported in the legislature and in the society at large by a predominantly and pervasively

[195] There the contentions of leading public educators that bible reading would advance "spiritual enlightenment" and the "principles of virtue , morality, patriotism, and good order—love and reverence for God—charity and good will to men" reaffirmed its inherently religious character. *Schempp*, 374 U.S. at 224, 270-71, 279-80 (Brennan, J., concurring). *McGowan* also makes clear that the fact that a religious institution supports a particular law is offset if the reasons put forward by the religious spokespeople are also secular. 366 U.S. at 478, n.28 (Frankfurter, J. concurring).

religious constituency, the claim of secular purpose must fail.[196]

Epperson provides singular guidance. In *Epperson*, the Court had to discover why something was singled out for exclusion from an otherwise unrestricted program. The Court invalidated the statute prohibiting the teaching of evolution because it was "a product of the upsurge of fundamentalist, sectarian conviction" that the theory of evolution "denied the divine creation of man." 393 U.S. at 98, 108. In so doing, the Court noted the intrinsically religious character of public adovcacy for the law.[197]

Here, as in *Epperson*, the law does not fully and perfectly embody the religious teaching.[198] In the

[196] The question here is not to discover the individual motivation of the legislators, but rather the character of the belief in society at large, of which the legislative debates are an important reflection. Thus the concern that motivational analysis based on legislators' statements alone, lacks permanence and reliability in constitutional decisionmaking is not involved here. The statements of legislators cannot be divorced from the character of an issue in its present context. *Compare United States v. O'Brien* 391 U.S. 370 (1968).

[197] *Epperson* noted the following advertisement as typical of the public appeal which was used in the campaign to secure adoption of the statute:

> The Bible or Atheism, Which?
>
> All atheists favor evolution. If you agree with atheism vote against Act No. 1. If you agree with the Bible vote for Act No. 1. . . . Shall conscientious church members be forced to pay taxes to support teachers to teach evolution which will undermine the faith of thier children? *The Arkansas Gazette,* Little Rock, November 4, 1928, p. 12, cols. 4-5

393 U.S. at 108, n.16.

[198] The *Epperson* majority noted Clarence Darrow's comment that the statute "did not insist on the fundamentalist theory in all

school prayer cases, the Court also rejected the notion that compromised religion is no religion at all. Thus, in *Engel*, the Court invalidated an opening prayer drafted by the Regents which had been concededly drained of sectarian content. 370 U.S. at 423, 430, 436.

The arguments of the Congressional proponents of the riders and the literature of the "right-to-life" movement, whether they emanate from churches, non-sectarian groups or private individuals, reflect the same fervor and echo the same themes. *See* Facts *supra* § 11. That the Hyde Amendments reflect a compromised version of their goals does not obscure their religiosity.

The district court thus failed to follow the settled instruction of this Court to evaluate a law's purpose in light of present rather than past reality. The district court drew on the past instead of looking to the present, and mistakenly relied on this Court's opinion in *Roe v. Wade* to justify its conclusion that the clear purpose of the Hyde Amendments to prevent abortions is based on "a traditionalist view more . . . than any religious one." Slip op. at 323-24.[199] *Roe v. Wade* prohibits enacting the belief that a human life begins at

respects" but permitted teaching "that the earth is round and the revolution on its axis brings the day and night, in spite of all opposition." 393 U.S. at 102, n. 9.

[199] Laws enacting the anti-abortion view that the fetus is a human life are not insulated from invalidation under the Establishment Clause because they are allied, as the district court felt, with a traditionalist morality. The clear teaching of establishment cases is that even secular moral values cannot be advanced through religious means. *Committee for Public Education v. Nyquist*, 413 U.S. at 783, n. 18, citing *School District of Abington v. Schempp*, 374 U.S. at 278-81 (Brennan, J., concurring).

conception regardless of its religious character. Moreover, *Wade* intimates that the concern for the fetus as an actual human life—which is distinct from an interest in potential life—is too religiously determined to support valid civil enactments. 410 U.S. at 159. The record in this case and the extensive findings of the district court bring the full religious character of this belief to light.

B. The Hyde Amendment Has a Primary Effect of Advancing One Religious Belief and Inhibiting Opposing Religious and Non-Religious Belief and Practice.

Even where a law has a clear and distinct secular purpose, the Court must determine whether or not it has a primary effect that either advances or inhibits religion. As Justice Powell made clear in *Nyquist*, the effect test presents a separate hurdle because "the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between church and state." *Committee for Public Education v. Nyquist*, 413 U.S. at 774. The effect test requires invalidation of laws which, though neutral and secular in intent, "aid one religion, aid all religions, or prefer one religion over another." *Everson v. Board of Education.*

The inquiry into religious effect has emerged as the strictest aspect of establishment clause analysis. Impermissible effect need not be direct, as the lower court here assumed. Slip op. at 325. A law, neutral on its face, which has the effect of providing substantial support, directly or indirectly, to religion fails the effect test. *Committee for Public Education v. Nyquist*, 413

U.S. at 767-68, 783. In *Nyquist,* Justice Powell rejected the contention that the Court must decide which effect is *the* primary one and which is secondary. It is sufficient that the law has *a* primary effect—rather than an effect which is remote, indirect and incidental—which advantages religion. 413 U.S. at 783 n. 39.

Here, we are dealing with effects which are substantial rather than remote, indirect or incidental. Legislative enactment of a belief that the fetus is human life from the moment of conception substantially advances religion and inhibits the exercise of religious and conscientious liberty. *See* Facts *supra* §§ 9, 11.

On the symbolic level alone, the establishment clause is violated because the Hyde Amendments place the power, prestige and financial support of government behind the view that the fetus is human life. *Engel v. Vitale*, 370 U.S. at 429-30; *School Board of Abington v. Schempp*, 374 U.S. at 261-63, comparing *Zorach v. Clauson*, 343 U.S. 306 (1952), with *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 203; *Walz v. Tax Commission*, 379 U.S. at 668. The legislative debates make clear that the proponents of the Hyde Amendment were less concerned with the practical impact of the riders than with affirming the "principle of life." *See* Facts *supra* § 10.

The riders are widely viewed as embodying and sponsoring the religious doctrine of denominations which oppose abortion as murder or homicide. At the same time, they disparage the religious, ethical and moral convictions of those who view the abortion decision as a necessary and appropriate moral choice under circumstances which threaten the survival, health and

fulfillment of existing life. *School District of Abington v. Schempp*, 374 U.S. at 219, citing *Everson*, 330 U.S. at 52.

The unconstitutional impact of the excision of Medicaid reimbursement for abortion is not simply symbolic; the riders seek to prevent poor women from obtaining legal, medically necessary abortions, and they succeed in doing so. By exacting submission to childbearing as the price of retaining their Medicaid entitlement, the riders pressure poor women to forego their convictions and conform their conduct to that segment of religious opinion which condemns abortion.

The impermissibility of the Hyde Amendments does not depend, however, on their efficacy in forcing women to carry pregnancies to term or in barring them altogether from safe, legal abortion. The establishment clause forbids schemes which require people to take special measures to avoid acquiescence in the state-sponsored religious view. *School District of Abington v. Schempp*, 374 U.S. at 224 n. 9. *Engel v. Vitale*, 370 U.S. at 430-31. "The absence of any element of coercion, . . . is irrelevant to questions arising under the Establishment Clause." *Committee for Public Education v. Nyquist*, 413 U.S. at 786; *Torcaso v. Watkins*, 367 U.S. 488 (1961).

The existence of an excusal provision does not save school prayers from unconstitutionality; it is likewise irrelevant that some members of plaintiffs-appellees' class may succeed in scraping up the fee or finding a free abortion. Not only are such "alternatives" available to but a portion of plaintiffs-appellees' class, but the desperation and health risks suffered as a result of delay itself are every bit as offensive to the First

Amendment as the embarassment or isolation suffered by the school child who must seek exemption from religious exercises. *Engel v. Vitale*, 370 U.S. at 430; *see: Illinois ex rel. McCollum v. Board of Education,* 333 U.S. at 227.

Although the establishment clause is violated without "proof that particular religious freedoms are infringed," *School District of Abington v. Schempp*, 374 U.S. at 224 n. 9, here the free exercise rights of indigent women who do not believe that human life begins at fertilization and for whom abortion may be the moral and religiously required choice, are simultaneously violated. The violation of free exercise is *a fortiori* an impermissible inhibition of religion under the effect test.

Our society is divided on religious and conscientious grounds on the question of when human life begins and on the morality of abortion. The effect test enjoins the state from discriminating on religious grounds—preferring one side of the controversy over the other and imposing those beliefs on those who reject their validity in the distribution of necessary health care benefits. *Everson v. Board of Education*; *Torcaso v. Watkins*. The excision of funding for medically necessary abortion under a program of comprehensive service is classic "religious gerrymandering" which cannot survive the neutrality demanded by the Establishment Clause. *Walz v. Tax Commission,* 397 U.S. at 696 (Harlan, J., concurring).

State neutrality on this matter of private conscience is furthermore essential to preserving the public peace. While philosophers, theologians and ethicists might debate the contours of "religious", courts look for their

definitions to those concrete phenomena which threaten the evils the First Amendment was designed to avoid. When an issue is perceived as religious, particularly by opposing religions, state sponsorship sacrifices the reality of neutrality necessary to the preservation of religious harmony and public peace. The danger is heightened when the law, as here, inhibits as well as deprecates a moral decision-making process which is sacred to the dissenting faiths. It is a particularly significant indicator of impermissible religiosity that pro-choice theologians and *amici curiae* unequivocally identify the law as advancing a religious view of abortion. *See Illinois ex rel. McCollum v. Board of Education,* 333 U.S. at 228 n.19.

C. The Riders Compel And Invite Excessive Entanglement Of Government And Religion.

The excessive entanglement test has often been described as preserving the integrity and independence of both religion and government. As Justice Black wrote in *Engel v. Vitale*, the "first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy the government and to degrade religion." 370 U.S. at 431.

Two components of the excessive entanglement test have been recognized by the Court: administrative interference with or surveillance of religious activities; and political entanglement of religious institutions in the government process for sectarian ends. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The Hyde Admendments violate the administrative component because they impermissibly entangle the

state in a religious decision-making process. Civil authority is forbidden to set the standards for the abortion decision here just as it may not review doctrinal matters affecting internal religious affairs. *Jones v. Wolf*, ___ U.S. ___, 99S. Ct. 3020 (1979). *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *see also, United States v. Ballard, 322 U.S. 78, 86* (1944).

The riders also reflect and exacerbate the divisiveness that normally attends religiously based legislation. The political entanglement test is rooted in the framers understanding that the intermeddling of church and state threatens the social fabric.[200] *Everson v. Board of Education*, 330 U.S. at 3-11; *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. at 228, n. 19 (Frankfurter, J., concurring); *School District of Abington v. Schempp*, 374 U.S. 219 (1963). In the school prayer cases, which came to this Court in a

[200] James Madison explained this in his historic Memorial and Remonstrance:

> [I]t will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions. . . . If . . . we begin to contract the bonds of Religious freedom, we know no name that will too severely reproach our folly. At least let warning be taken at the first fruit of the threatened innovation. The very appearance of the Bill has transformed that 'Christian forbearance, love and charity,' which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded should this enemy to the public quiet be armed with the force of law?

Everson v. Board of Education, 330 U.S. at 69-70.

context nearly as explosive as this one, the Court emphasized that "bitter strife" is the ultimate result of the struggles of "religious groups . . . with one another to obtain the Government's stamp of approval." *Engel v. Vitale,* 370 U.S. at 426-29; *see also, School District of Abington v. Schempp,* 374 U.S. at 230 (Brennan, J., concurring).[201]

In *Lemon v. Kurtzman,* this Court adopted the suggestion of Justice Harlan, concurring in *Walz v. Tax Commission,* 397 U.S. at 695, that a law's potential for political divisiveness along religious lines should be an independent test for excessive entanglement. *See: Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973); *Meek v. Pittenger,* 421 U.S. 349, 372 (1975).

As they were explained by the Chief Justice in *Lemon v. Kurtzman*, the dynamics of divisiveness along religious lines aptly describe the present day effort to restrict abortion funding. Political action to enact the religious belief that the fetus is human life has been spearheaded by religious institutions and a religiously grounded movement, *see* Facts, *supra*, at § 11; heated political opposition on religious, constitutional and other grounds has inevitably resulted; and the issue has assumed single-issue importance such that "[c]andidates . . . [have been] forced to declare and voters to choose . . . and many people confronted with issues of this kind . . . [have found] their votes

[201] In *Schempp*, Justice Brennan, concurring, observed that "deep feelings are aroused when aspects of [the] relationship [between religion and the public schools] are claimed to violate the injunction of the First Amendment . . ." 374 U.S. at 230.

aligned with their faith." *Lemon v. Kurtzman*, 403 U.S. at 622. *See* Facts, *supra*, § 12.[202]

The political divisiveness attending the Hyde Amendments corroborates the religious nature of the "human life" tenet and requires the amendments' invalidation. The dangers of divisiveness may justify a finding of unconstitutionality even when a clear and substantial secular interest can be discerned. As Mr. Justice Powell noted in *Nyquist*, "while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored . . ." 413 U.S. at 797-98. *See: Meek v. Pittenger*, 421 U.S. 349 (1975).

Whether political divisiveness is an independent test or a "warning signal", it is clear that the dangers perceived for both religion and democratic government are far greater here than in the parochial school aid cases. The effort to restrict abortion affects not only Congress but every level of government, every aspect of

[202] *Lemon* also noted that "the need for continuing annual appropriations . . . and the likelihood of larger and larger demands [with] pressures for expanding aid" intensifies divisiveness in the context of parochial school aid. 403 U.S. at 623. The district court erred, however, in regarding the annual nature of appropriations as an essential rather than an additional criterion of political entanglement. Slip op. at 325-26. While it is true, as the lower court notes, that the annual battles attending the Labor-HEW riders would be obviated if a constitutional amendment were adopted, the fact is that, for four years, the issue has been a virtually intractable one and promises no respite. Moreover, that this issue, like the issue of school prayer, might be immunized by a constitutional amendment from scrutiny under the Establishment Clause, does not relieve the present obligation of the Court to invalidate religious enactments.

the political process and every legislative matter which has a direct or tangential impact on the availability of abortion in this country.

Moreover, the dangers of divisiveness are enhanced, first because of the volatility of a movement which invokes divine obligation to oppose abortion as murder, and, second, because the effect of these riders is not simply to aid religious institutions, but to impose the moral view of one segment of the religious community on those whose conscience dictates otherwise. As the district court recognized, the political divisiveness created by the Hyde Amendments signals the need for strict scrutiny where liberty protected by the Fifth Amendment and the rights of conscience, harbored by the First, are at stake. Slip op. at 328.

Though this Court's injunction will not, in one fell swoop, end the destructive fragmentation we are experiencing, it will nonetheless preserve the integrity of our constitutional system, which, by insisting upon a super-majority to amend the Constitution, checks the power of a fervent single-issue minority to victimize the poor.

Indeed, the Court fulfills its highest office in precisely these circumstances when, against the deepest and most fervent of beliefs, it guards the separation of church and state and guarantees the liberty of individual conscience to all.

Conclusion

For the reasons stated, the Hyde Amendments violate the First and Fifth Amendments and the judgment of the lower court should be affirmed.

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Appendices

APPENDIX A

For the convenience of the Court, plaintiffs provide this list and brief description of their expert medical and theological witnesses.* Each witness is an acknowledged leader in his field.

The medical witnesses included:

Dr. Morton Bard, a Professor of Psychology at the City University of New York, and a Diplomate of the American Board of Professional Psychology. He is Director of the University's graduate programs in criminal justice and a frequent consultant to police departments. Dr. Bard testified on the impact on women of having to carry to term a pregnancy which resulted from rape.

Dr. Judith Belsky, the Psychiatric Consultant to the Department of Obstetrics and Gynecology at Bellevue Hospital since 1969. Most of her work has been with Medicaid-eligible patients. (T. 3518.) Dr. Belsky testified about abortion practice at Bellevue and New York University Hospital before the liberalization of abortion laws and her own rigorous, detailed, unpublished, statistical study based on experiences interviewing several hundred women referred for psychiatric evalua-

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* Plaintiffs do not list here approximately twenty other witnesses. This group included: senior state Medicaid officials, who testified on the difficulties of implementing the Hyde standards because of the uncertain language; welfare recipients; and the founder and executive director of a national organization of abortion providers, who testified on the economics of providing quality abortion services and the minimal existing and projected existence of free or reduced fee abortions.

tion and presentation to Bellevue's Abortion Committee.

Dr. David Bingham, Director of the Planned Parenthood out-patient abortion clinic in Norwich, Connecticut and a practicing obstetrician and gynecologist. A Diplomate of the American Board of Obstetrics and Gynecology and a Fellow of the American College of Obstetricians and Gynecologists, he served on the faculty of Yale Medical School from 1972-74. Dr. Bingham testified about the practice of obstetrics and gynecology under restrictive abortion laws, including the discriminatory enforcement of legal standards and the tragic results of self-induced abortion. He described the difficulties of practicing medicine under the Hyde Amendment.

Dr. Johan W. Eliot, Professor of Population Planning in the School of Public Health at the University of Michigan. He was also the Medical Director of Washtenaw County League for Planned Parenthood in Ann Arbor which performs 2500 abortions a year; Dr. Eliot personally performed one-third of those. (T. 387.) A graduate of Harvard University's Medical School, Dr. Eliot trained in pediatrics at Boston Children's Hospital and the Mayo Clinic. He is board certified in two specialties—pediatrics and preventive medicine, with a subspecialty in maternal and child health. (T. 387.) Dr. Eliot testified on the difficulties the Hyde Amendment creates by denying reimbursement for medically necessary abortions.

Dr. Jane Hodgson, who has practiced obstetrics and gynecology for 30 years and now holds a full-time position at the University of Minnesota Medical School. She is the Director of the Fertility Control

Clinic at St. Paul Ramsey Hospital where abortions and sterilizations are performed. Dr. Hodgson testified on the medical problems created or aggravated by unwanted pregnancies and on the difficulties of applying the Hyde Amendment standards to those conditions.

Dr. Adele Hofmann, Director of the Adolescent Medical Units and Associate Professor of Clinical Pediatrics at the New York University School of Medicine. She is a former President of the Society of Adolescent Medicine. In a program she developed, Dr. Hofmann supervises the health care of the 300 teenagers seen weekly at Bellevue and University Hospitals, including evaluation of teenage pregnancies. Dr. Hofmann has written extensively on biomedical ethics, confidentiality and privacy in adolescent medicine, including a chapter in a standard pediatrics text. (T. 1312-1318, 1335; Pl. Exh. 20, Approaches to Adolescent Health Care in the 1970's.) Dr. Hofmann testified about the problems of treating pregnant adolescents, the special health risks of childbearing for teenagers, and the dangers to emotional and social development. She explained the problems of interpreting the Hyde Amendment standard in providing proper health care to pregnant adolescents.

Dr. Seymour Romney, who chaired the Albert Einstein Medical School's Department of Obstetrics and Gynecology for 15 years and directed those departments at Bronx Municipal Hospital and Albert Einstein Hospital. In 1972 he stepped down from the chairmanship to concentrate on cancer research; he is now the Chief of the Division of Oncology. He has authored numerous scholarly articles on problems of maternal health and pregnancy. He is the Chief Editor of a

current text on obstetrics and gynecology. (T. 1045-53, 1109.) As a teacher responsible for running a large ob/gyn service, he has supervised the performance of a large number of abortions. (T. 1171.) Dr. Romney testified on two occasions. His first testimony covered the meaning of "medical necessity", "life-endangerment", and "life-saving" to doctors in the context of pregnancy, particularly pregnancy for poor women. He testified a second time on the 1978 "severe and long-lasting physical health damage" standard of the 1978 Hyde Amendment as well as on the rape and incest requirements.

Dr. Edmund O. Rothschild, who testified in his capacity as Senior Vice President of New York City's Health and Hospital Corporation, which is charged with responsibility for providing health care services to the residents of New York City. The most senior physician on the Health and Hospital Corporation's staff, Dr. Rothschild's duties include monitoring the quality of professional medical services in the City's municipal hospital system and overseeing the Corporation's contracts with medical schools and voluntary hospitals. (T. 677, 681.) He is a board-certified specialist in internal medicine, a fellow of the American College of Physicians, and the author of 16 articles. Dr. Rothschild testified on the difficulties Health and Hospital Corporation doctors would have interpreting the Hyde Amendment standard and the effects enforcement of the Hyde Amendment would have on the health of women and on the municipal hospital system.

Dr. Richard Sarles, Associate Professor of Psychiatry and Pediatrics at the University of Maryland School of Medicine. Dr. Sarles directs a child psychia-

try pediatric clinic in Baltimore and has published scholarly works in both child psychiatry and pediatrics. (T. 3736-37.) He is an expert on incest and has published an article and a chapter in a major pediatrics text on incest. (T. 3737-38.) Dr. Sarles testified on the impact of a pregnancy resulting from incest, the necessity for the option of abortion and the difficulties created by the Hyde Amendment's prompt reporting requirement.

Dr. Don Sloan, a practicing physician and an Assistant Clinical Professor of Obstetrics and Gynecology at New York Medical College where he is also Director of the Psychosomatic Clinic. (T. 1628-30.) He testified on the effects of the stress of an unwanted pregnancy on the physical course of a pregnancy.

Dr. Christopher Tietze, one the world's preeminent authorities on human fertility and its control. Since 1956, Dr. Tietze has been on the staff of the Population Council. He and his colleagues at the Council did the basic work developing methods of statistical analysis on the effectiveness, safety, and acceptability of various methods of birth control. Dr. Tietze has written or supervised the writing of over 200 scholarly papers, mostly in the field of human reproduction. Sixty of those papers are on abortion. (Pl. Exh. 9.) Prominent among his publications is *Induced Abortion: 1975 Factbook, 1977 Supplement*. Dr. Tietze testified on studies of therapeutic abortions he and others did prior to the reform of abortion laws. These studies document the different interpretations of the life-preserving standard widely used at that time and the resulting discriminatory distribution of abortion services. (Pl. Exh. 10, 11, Studies in Family Planning, "Therapeutic Abortions in

New York City" (1965-67); Studies in Family Planning, "Therapeutic Abortions in U.S.A." (1963-68). Dr. Tietze also testified on studies done in other countries on the effect of different abortion policies and laws on behavior, morbidity, and mortality rates.

Frederick S. Jaffe, now deceased, founder and former President of the Alan Guttmacher Institute, a major research and policy analysis organization in the field of fertility control. Mr. Jaffe wrote and worked with medical and social scientists on problems of controlling human reproduction for 23 years. He had published over 40 articles in professional and scholarly journals and co-authored two major books on human reproduction and public policy. (T. 1508-1517, 1579-1580.) Mr. Jaffe testified on the lack of charitable resources nationwide to provide abortions for poor women who are denied publicly-funded abortions. He also reported on Medicaid reimbursement in states which had restricted their Medicaid reimbursement policies in response to the Hyde Amendment, pointing out the dramatic decline in the number of funded abortions in those states.

The theological witnesses included:

Rabbi David Feldman, ordained as both an Orthodox and Conservative Rabbi, serves the Bay Ridge Jewish Center Congregation in Brooklyn. He serves on the Law Committee and the Steering Committee of the Rabbinical Assembly and is Co-Chair of the Medical Ethics Commission of the Jewish Federation of New York. (T. 1854.) Rabbi Feldman testified as to the theological position on abortion in Jewish law in conservative and reform teachings.

Dr. Gillian Lindt, Professor of Sociology of Religion and Chairperson of the Department of Religion in the Graduate Faculty at Columbia University. (T. 4084.) Her major work and teaching is in the history of sociological thought and in public opinion formation. (T. 4199-4200.) She had never done any work on the abortion issue prior to preparing to testify in this case. (T. 4090; Pl. Exh. 170, *curriculum vitae*.) Dr. Lindt testified on the pervasively religious purpose and motivation of the Hyde Amendment as illustrated by the language of the legislative debates.

Dean John Philip Wogaman, the Dean and Professor of Christian Social Ethics at the Wesley Theological Seminary, a United Methodist Seminary with an ecumenical orientation. (T. 1952.) He is the immediate past President of the American Society of Christian Ethics, the major North American academy society of teachers and scholars of Christian ethics, both Catholic and Protestant. (T. 1953a.) He has a Bachelor of Sacred Theology and a Ph.D. in Social Ethics from Boston University. He is an ordained Methodist minister, has served as a pastor, missionary, teacher and scholar. He serves on a number of ecumenical and denominational boards and has written many books, including *Christian Method of Moral Judgment* (1978); *Population Crisis and Moral Responsibility* (1972) (editor); and *Protestant Faith and Religious Liberty* (1967), as well as a pamphlet entitled, "Abortion: Shall We Return To Absolutism?" Dr. Wogaman described the religious teachings of mainstream Protestant Christian ethics on abortion.

Rev. James E. Wood, Executive Director of the Baptist Joint Committee on Public Affairs. He holds de-

grees from Carson-Newman College (B.A.), Columbia University (M.A., Comparative Religion and Anthropology) and a Ph.D. in Divinity from Southern Baptist Theological Seminary. He has taught history of religions for 22 years, both in Japan and at Baylor University where he chaired an Interdepartmental Graduate Degree Program in Church-State studies and is founding editor of the Journal of Church and State. He has written several books and over 50 articles on Church-State relations, including an article in 1973 on *Roe v. Wade*. He holds a number of positions in ecumenical groups particularly concerned with religious liberty. (T. 3174-3177; Pl. Exh. 129, *curriculum vitae*.) Rev. Wood explained the Baptist position respecting abortion.

APPENDIX B

FEDERAL STATUTES

The relevant sections of the Social Security Act, 42 U.S.C. 1396 *et seq.* are fully set forth in Brief of Appellees, Appendix B, *Williams v. Zbaraz*. An additional section of 42 U.S.C. is set forth below.

42 U.S.C. § 1396f

Observance of religious beliefs

Nothing in this subchapter shall be construed to require any State which has a plan approved under this subchapter to compel any person to undergo any medical screening, examination, diagnosis, or treatment or to accept any other health care or services provided under such plan for any purpose (other than for the purpose of discovering and preventing the spread of infection or contagious disease or for the purpose of protecting environmental health), if such person objects (or, in case such person is a child, his parent or guardian objects) thereto on religious grounds.

APPENDIX C

FEDERAL REGULATIONS

I. Regulations Implementing the Hyde Amendment issued July 21, 1978 (43 Fed. Reg. 31868, 3178-79).

C.F.R. § 441.202 *General Rule.*

FFP is not available in expenditures for an abortion except under circumstances described in §§ 441.203 through 441.205.

C.F.R. § 441.203 *Life of the mother would be endangered.*

FFP is available in expenditures for an abortion when a physician has found, and certified in writing to the medicaid agency, that on the basis of his professional judgment, the life of the mother would be endangered if the fetus were carried to term. The certification must contain the name and address of the patient.

C.F.R. § 441.204 *Severe and long-lasting damage to physical health.*

(a) FFP is available in expenditures for an abortion when two physicians have found, and certified in writing to the medicaid agency, that on the basis of their professional judgment, severe and long lasting physical damage to the mother would result if the pregnancy were carried to term. The certification must contain the name and address of the patient.

(b) At least one of the two physicians must also certify that he is not an interested physician, as defined in paragraph (c) of this section.

(c) For purposes of paragraph (b) of this section, an "interested physician" is a physician—

(1) Whose income is directly or indirectly affected by the fee paid for the performance of the abortion; or

(2) Who is the spouse of, or another relative who lives with, a physician whose income is directly or indirectly affected by the fee paid for the performance of the abortion.

C.F.R. § 441.205 *Rape and incest.*

(a) FFP is available in expenditures for medical procedures performed upon a victim of rape or incest if the medicaid agency has received signed documentation from a law enforcement agency or public health service stating—

(1) That the recipient upon whom the medical procedure was performed was reported to have been the victim of an incident of rape or incest;

(2) The date of the incident;

(3) The date of the report, which must be within 60 days of the incident;

(4) The name and address of the victim;

(5) The name and address of the individual who reported the rape or incest, if different from the victim; and

(6) That the report included the signature of the individual who reported the incident.

(b) FFP is also available in expenditures for abortions for victims of rape or incest under the circumstances described in §§ 441.203 and 441.204 without regard to the requirements of this section.

§ 441.206 *Documentation needed by the medicaid-agency.*

FFP is not available in any expenditures for abortions or other medical procedures otherwise provided for under §§ 441.203 through 441.205 if the medicaid agency has paid without first having received the certifications and documentation specified in those sections.

§ 441.207 *Drugs and devices and termination of ectopic pregnancies.*

FFP is available in expenditures for drugs or devices to prevent implantation of the fertilized ovum and for medical procedures necessary for the termination of an ectopic pregnancy.

§ 441.208 *Recordkeeping requirements.*

Medicaid agencies must maintain copies of the certifications and documentation specified in §§ 441.203 through 441.205 for 3 years under the recordkeeping requirements at 45 CFR 74.20.

II. Regulations implementing the Hyde Amendment issued January 26, 1978 (43 Fed. Reg. 4570, 4581).

42 C.F.R. § 449.104 *Severe and long-lasting damage to physical health.*

Federal financial participation is available in expenditures for an abortion when two physicians have found, and so certified in writing to the applicable State agency, that on the basis of their professional judgment, severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term.

42 C.F.R. § 449.105 *Rape and incest.*

Federal financial participation is available in expenditures for medical procedures performed upon a victim of rape or incest if the State agency has received signed documentation from a law enforcement agency or public health service stating that: (a) The person upon whom the medical procedure was performed was reported, within 60 days of the incident, to have been the victim of an incident of rape or incest; and (b) the report included the name, address and signature of the person who reported the rape or incest. Federal financial participation is also available in expenditures for abortions for victims of rape or incest under the circumstances described in §§ 449.103 and 449.104 without regard to the requirements of the preceeding sentence.